

*United States Court of Appeals  
for the  
District of Columbia Circuit*



**TRANSCRIPT OF  
RECORD**



BRIEF FOR APPELLANTS

United States Court of Appeals  
for the District of Columbia Circuit

FILED APR 19 1968

Nos. 21,277, 21,541-47

177

*Nathan J. Pyle*  
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STAR TELEVISION, INC. (No. 21,277); COMMUNITY BROADCASTING, INC. (No. 21,541); CITIZENS TELEVISION CORP. (No. 21,542); THE FEDERAL BROADCASTING SYSTEM, INC. (No. 21,543); HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC. (No. 21,544); GENESEE VALLEY TELEVISION CO., INC. (No. 21,545); MAIN BROADCAST CO., INC. (No. 21,546); ROCHESTER TELECASTERS, INC. (No. 21,547),

Appellants.

v.

FEDERAL COMMUNICATIONS COMMISSION,

FLOWER CITY TELEVISION CORPORATION,

Appellee,

Intervenor.

Appeals from a Decision and Order of the Federal Communications Commission

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## QUESTIONS PRESENTED

Appellants submit that the questions presented in these consolidated appeals are as follows:

1. Whether the Commission's findings of fact and conclusions of law:
  - (a) are supported by substantial evidence of record?
  - (b) violate or disregard substantial evidence of record, precedents, and policy statements?
  - (c) Improperly disregard changed factual circumstances occurring after the closing of the evidentiary record?
2. Whether the Commission's proceedings violated provisions of the Administrative Procedure Act, 5 U.S.C. §551 et seq., the Communications Act of 1934, as amended, 47 U.S.C. §151 et seq., and are otherwise contrary to law in the following respects:
  - (a) Did appellants have an opportunity to file exceptions to an Initial Decision which resolved all issues and ranked all applicants under the comparative criteria?
  - (b) In view of the dismissal of RAETA's application, did appellants have an opportunity to file proposed findings, conclusions and exceptions to an Initial Decision?
  - (c) Did the Commission's decision state findings and conclusions which adequately support the grant to Intervenor?
  - (d) Did the Commission erroneously refuse to admit certain proffered evidence?
  - (e) Did the Commission err in refusing to consider and make findings on evidence relating to the programming needs in the Rochester area and how such needs would be met by the respective applicants?

- (f) Did the Commission improperly refuse to consider the petition of some of the applicants that it force or persuade the applicants to merge, and did the Commission err in not effectually inquiring of the applicants their interests in such a merger and the effect thereof on the public interest?
3. Whether, under the circumstances of this case, the Commission's denial of the petition of Rochester Telecasters, Inc., for leave to amend its application was arbitrary and therefore unlawful.
  4. Did the Commission err in failing to consider uncontradicted facts presented on reconsideration demonstrating that major changes in the television industry undermined its conclusion that Intervenor was entitled to a preference under the criterion of integration of ownership and management?
  5. Whether the Commission could lawfully, in its final decision, express the desirability of updating proposals "so that this proceeding can be decided on the basis of the facts as they now exist" and yet select and consider only such changes since the closing of the record as it wished to consider?
  6. Whether, in view of the stale quality of the record and the Commission's difficulty in finding significant differences between the applicants, it was legally obliged to order the updating of the applications and further hearing thereon?

Appellee and intervenor submit that the questions presented in these consolidated appeals are as follows:

1. Whether the Commission's findings and conclusions are:
  - (a) supported by the evidence of record?

- (b) precluded by previous precedents and policy statements?
  - (c) reasonable decisional judgments?
2. Whether the proceedings which resulted in a grant to Flower City were procedurally defective in violation of Section 8 of the Administrative Procedure Act, 5 U.S.C. 557, in the following respects:
- (a) In view of the dismissal of RAETA's application, was the Examiner's decision inadequate, thereby affecting the proposed findings, exceptions, and oral arguments?
  - (b) Did the Commission's decision inadequately state its findings and conclusions?
  - (c) Did the Commission improperly refuse to admit certain proffered evidence?
  - (d) Was the Commission required to adopt the suggestion of one or two of the applicants that it force or persuade all the applicants to merge?

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Appellee,

Intervenor.

Appeals from a Decision and Order of the  
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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Pursuant to Section 402(b)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §402(b)(1), and 5 U.S.C. §702 (derived from Section 10 of the Administrative Procedure Act of 1946), each of the appellants in these consolidated cases appeals from the Decision of the appellee, Federal Communications Commission ("Commission"), released August 3, 1967, denying its application for a construction permit for a new television broadcast

station on Channel 13, Rochester, New York, and granting the mutually exclusive application of intervenor, Flower City Television Corporation ("Flower"), and from the Memorandum Opinion and Order of the Commission released November 29, 1967, denying reconsideration.

The Commission's Decision (FCC 67-924) is reported at 9 F.C.C.2d 249 and 10 R.R.2d 1059. <sup>1/</sup> The Memorandum Opinion and Order denying reconsideration (FCC 67-1276) is reported at 10 F.C.C.2d 718, 11 R.R.2d 771.

The appellants are Star Television, Inc. ("Star")--No. 21,277; Community Broadcasting, Inc. ("Community")--No. 21,541; Citizens Television Corp. ("Citizens")--No. 21,542; The Federal Broadcasting System, Inc. ("Federal")--No. 21,543; Heritage Radio and Television Broadcasting Co., Inc. ("Heritage")--No. 21,544; Genesee Valley Television Co., Inc. ("Genesee")--No. 21,545; Main Broadcast Co., Inc. ("Main")--No. 21,546; and Rochester Telecasters, Inc. ("RTI")--No. 21,547.

#### STATEMENT OF THE CASE

##### A. Synopsis of the Case

On August 3, 1961, following rule making, the Commission announced that it had assigned Channel 13 to Rochester, New York. <sup>2/</sup> In September and

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- 1/ Citations to "R.R." or "R.R.2d" are to volumes of Pike & Fischer Radio Regulation. The Initial Decision and the Decision, both of which appear in 9 F.C.C.2d, are referred to in this brief merely as "I.D." and "Decision," with citations to the appropriate paragraphs. The order denying the petitions for reconsideration is also cited merely by paragraph number.
  - 2/ Channel Assignment in Rochester, New York, 21 R.R. 1748a. In Joint Council on Educational Broadcasting v. FCC, 113 U.S. App. D.C. 86, 305 F.2d 755 (1962), this court upheld the Commission's determination to make the channel available for commercial use as a network affiliate rather than reserve it for non-commercial, educational broadcasting. See footnote 2, at page 7, infra.

The Commission's Decision was released on August 3, 1967. Appellant Star appealed to this court on September 5, 1967. The other appellants appealed on December 29, 1967, following the Commission's denial, on November 29, 1967, of their petitions for reconsideration. On February 19, 1968, the court stayed the effectiveness of the Commission's orders and actions pending disposition of these appeals or further order of the court. <sup>1/</sup>

#### B. The Comparative Issue

Of the issues designated for hearing, the comparative issue, was the most important; and it is the only issue in the case that is still significant. <sup>2/</sup> As later modified it read as follows:

"To determine on a comparative basis which of the mutually exclusive operations proposed in the above-captioned applications would best serve the public interest, convenience and necessity in light of the significant differences among the applicants as to:

- (a) The background and experience of each bearing on its ability to own and operate the proposed television broadcast station.
- (b) The proposals of each with respect to the management and operation of the proposed television station.

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- <sup>1/</sup> The channel is now occupied on an interim basis by WOKR(TV), licensed to Channel 13 of Rochester, Inc., a corporation owned equally by eight of the applicants, including intervenor and seven of the appellants (all except RTI.) The interim operation began, with the Commission's encouragement and approval, in September 1962, and will continue until the successful applicant commences operation under the terms of a regular authorization. In effect, the court's stay order of February 19, 1968, continues WOKR(TV) on the air pending judicial review.
  - <sup>2/</sup> There were several issues dealing with technical and financial qualifications. On June 19, 1962, the Commission added an issue as to the financial qualifications of RAETA. There is no question now remaining as to the legal, technical, or financial qualifications of any of the appellants or of intervenor.

(c) The programming service proposed in each of the above-captioned applications.

(d) The programming service proposed in each of the applications considered in the light of the following factors:

(1) Whether there are particular types of classes of programs for which there is an unfulfilled need in the area proposed to be served.

(2) The extent to which the program proposal of each applicant would meet such needs.

The original designation order of January 2, 1962, contained subsections (a), (b), and (c) only. RAETA petitioned the Commission to enlarge the standard comparative issue to include subsection (d); and on April 13, 1962, the Commission did so. (FCC 62-385.)

### C. Hearings Before the Examiner - 1962

The case was assigned to Hearing Examiner Annie Neal Huntting. Pre-hearing conferences began promptly on January 12, 1962. The hearing proper opened on June 4, 1962, and hearing sessions were held from time to time through December 7, 1962.

Each applicant submitted as evidence written statements of the background and experience of its principals, the contacts and surveys it had made in the community, and its programming plans and policies. To expedite and simplify the hearing, the parties cooperated in keeping to a minimum the number of principals from each applicant called for cross-examination. Only four of Flower's 31 principals, for example, appeared as witnesses. They also shortened the hearing by assigning, by lot, to each applicant's attorney the primary responsibility for cross-examining the principals of another applicant. As a result of these cooperative efforts by all parties, only a few

days of hearing time were devoted to most of the applicants. More days of hearing were devoted to RAETA than to any other applicant; but only three and one-half days were spent on Flower, and this was typical. <sup>1/</sup>

The record was closed in December 1962. In a further effort to simplify the proceeding, proposed findings of fact and conclusions were filed in several steps. This process was completed on May 20, 1963, at which point the case was ripe for decision.

#### D. Initial Decision - 1964

Eight months later, on January 28, 1964, the Examiner released her Initial Decision. <sup>2/</sup> She proposed to grant the share-time proposal of RAETA and RTI upon the grounds that there was an over-riding need in the Rochester area for educational programs and that RAETA could best fill that need.

The great bulk of the lengthy Initial Decision was devoted to detailed recitation of the evidence as to each applicant--the residence, background, and civic activities of each principal; the degree to which each applicant would integrate ownership and management by involving stockholders in station operation; the manner in which each applicant surveyed the needs of the area and prepared its program proposal; details as to each applicant's proposed non-network programming. Detailed findings were also necessary as

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- 1/ On the last day of the hearing, December 7, 1962, the Examiner took note of the efforts that had been made to shorten and expedite the case, saying (T. 9691): "...I wish to thank all counsel for being very cooperative. I think that we have done a good job of getting through a long, hard case that had many issues and many applicants, and I think on the whole we have done a good job on expediting it, and I wish to thank everybody for their cooperation."
  - 2/ The Initial Decision is reported at 9 F.C.C.2d 264. The Examiner's findings and conclusions are separately numbered, and they are cited in this brief by paragraph number.

to the financial qualifications of RAETA and the past broadcast records of those principals who were already owners of broadcast stations or had been in the past.

The Examiner's conclusions were comparatively brief and limited. ¶1 of her conclusions set the tone and declared the premise for her choice of RAETA-RTI. It read, in its entirety, as follows:

"Education is the keystone upon which the morals, the wisdom, the health, and the wealth of our nation's culture are dependent."

She concluded that the most significant unfulfilled need in the area was the need for educational programming, that the most comprehensive and best-planned educational programming proposed was that specified by RAETA, and that the need for ABC television network programs could be met by RAETA-RTI since RTI, like the other commercial applicants, proposed to affiliate with ABC. <sup>1/</sup>(I.D., Concl. 5.) Her overall conclusion at this point was that, "The RAETA-RTI combination is thus entitled to a strong preference for the best proposal to fill the most significant unfulfilled programming need in the area proposed to be served." (I.D., Concl. 6.) <sup>2/</sup>

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- 1/ At the time, there was a factual dispute as to whether RTI would be able to obtain an ABC affiliation. That dispute no longer exists. See pp. 75, 77, infra.
  - 2/ In a sense, the Examiner was resolving an issue that antedated the allocation of the channel to Rochester. The principal question in the rule making proceeding for the assignment of Channel 13 was whether to make the channel available to commercial applicants, who would provide a third network outlet, or to reserve it for educational use. The Commission concluded at that time that "on balance, there is at this stage greater need for a third competitive commercial service than for the VHF educational reservation." Channel Assignment in Rochester, New York, 21 R.R. 1748a, 1752-53 (1961.) This court affirmed in Joint Council on Educational Broadcasting v. FCC, 113 U.S. App. D.C. 86, 305 F.2d 755 (1962), noting that a non-commercial educational group like RAETA could still apply for the channel in competition with commercial applicants.

In light of this conclusion, the Examiner saw no need for ranking or evaluating the applicants vis-a-vis each other under the Commission's classic comparative criteria. She made only a restricted application of those criteria, using the RAETA-RTI combination (and, to some extent, RAETA and RTI separately) as a standard against which the other applicants were measured and stating that, "Comparison of RAETA and RTI with other applicants on other comparative criteria reveals the following additional differences." (I.D., Concl. 7.) Her conclusions as to these criteria were as follows:

Area Familiarity (I.D., Concls. 8-18)--In Conclusion 18 she said: "RAETA and RTI are preferred over the following applicants on the over-all factor of area familiarity, which takes into consideration local residence, civic participation, and diversity of business occupations: Flower, Community, Heritage and Citizens. There is no substantial difference on the over-all area familiarity factor between RAETA and RTI on the one hand and each of the following applicants on the other: Genesee, Star, Main and Federal."

Integration of Ownership and Management (I.D., Concls. 19-29)--After noting the extent to which each applicant would have principals involved in station operation, the Examiner concluded that (Conclusion 29): "RAETA and RTI are preferred on this factor over Genesee and Heritage. RAETA and RTI are surpassed on this factor by Flower, Star, Community, Federal and Citizens. RAETA is also surpassed by Main, with whom RTI is substantially equal."

Broadcast Experience (I.D., Concls. 30-40)--The Examiner summarized the broadcast experience of each applicant's principals and concluded as follows (Conclusion 40): "RAETA, having had actual experience in Rochester in preparing and presenting television programs, is not surpassed on this factor by any applicant. RTI is surpassed on this factor by Flower, Genesee, Star, Community, Main, Federal and Citizens. RAETA is preferred on this factor over Main, as well as Heritage, which is substantially equal to RTI."

Diversification of Control of Mass Media of Communications (I.D., Concls. 41-48)--Noting that Federal owned a radio station in Rochester and that the leading principal of Star then controlled radio stations in

Rochester, Geneva, and Utica, New York, 1/ the Examiner concluded as follows: (Conclusion 48): "On this factor, RAETA and RTI are preferred over Star and Federal, and are substantially equal to Flower, Genesee, Community, Heritage, Main and Citizens."

Past Performance Records (I.D., Concls. 49-52)--The Examiner noted that, since RAETA had not been a licensee, its past experience in programming had been credited under the criterion of broadcast experience rather than the criterion of past performance. (I.D., Concl. 49.) 2/ She further noted that the principals of RTI, Genesec, Heritage, Main and Citizens had no past broadcast record to assay. (*Ibid.*) With respect to Flower, she noted that G. Bennett Larson, a 10% stockholder and proposed general manager, had been general manager and 20% owner of a combined AM and TV operation in Salt Lake City, Utah, from 1953 to 1959 but concluded that "information in the record concerning the past operation of these stations during that period is not sufficiently comprehensive to form the basis for a judgment on the over-all past operation." (*Ibid.*) She did conclude that past broadcast records of Federal and principals of Star and Community did not entitle those applicants to a preference over RAETA and RTI. (I.D., Concls. 50-52.)

Preparation (I.D., Concls. 53-54)--The Examiner concluded that, "None of the commercial applicants is entitled to a preference over RAETA and RTI on this factor, and RAETA is entitled to a preference over all other applicants with respect to the planning and preparation of educational programs." (I.D., Concl. 54.)

Programs (I.D., Concl. 55)--The Examiner's conclusion was that, "None of the commercial applicants is entitled to a preference over the RAETA-RTI combination on the factor of programming." (I.D., Concl. 55.)

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- 1/ The stations owned by Star's principal have since been sold. See Decision, ¶7. Also, Federal has since committed itself to sell its station. See pp. 71-73, *infra*.
  - 2/ Although she made extensive findings as to RAETA's past performance in the production and presentation of educational programs on existing Rochester television stations (I.D., ¶¶466-81), she refused as "immaterial" proposed findings as to the past performance of Cornell University stations managed by Community's 14% stockholder Hanna, a Rochester television station managed by Genesec's proposed manager Wiig, and Rochester radio and television stations managed by Citizens' 10% stockholder Fay. (I.D., ¶45, fn. 21, ¶79, fn. 40, ¶142, fn. 52.)

In her "Final Evaluation" (I.D., Concl. 59), the Examiner concluded:

"The strong preference due the RAETA-RTI combination for the best proposals to fill the most significant unfulfilled programming need in the area proposed to be served, together with such other preferences as have been awarded above, outweighs, in each case, such preferences as have been earned by any of the remaining eight commercial applicants as a result of differences pointed out above." 1/

#### E. Lack of Comparative Evaluation in Initial Decision

Because of the Examiner's restricted application of the comparative criteria (which produced, in her judgment, a preference for the RAETA-RTI combination over other applicants), she made no conclusions comparing those applicants among themselves. Nor can such conclusions even be deduced from her Initial Decision. Such deductions are possibly only to the limited extent that she ranked some applicants ahead of the RAETA-RTI combination and others equal to it, or below it, under some criteria. For example, although her conclusion under the factor of Area Familiarity that RAETA-RTI was to be preferred to Flower, Community, Heritage and Citizens and was equal to Genesee, Star, Main and Federal indicates that she would rank Genesee, etc., ahead of Flower, etc., on this factor, it gives no indication of the extent or significance of the difference between the groups or as to how the applicants in each group ranked among themselves. It does indicate that she found several applicants superior to Flower in Area Familiarity, but it gives no clue as to how great the superiority was. Nor does it give any indication as to how she would have ranked those applicants among themselves. Similarly, under the comparative criterion of Integration of Ownership and Management

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1/ The Examiner also concluded that all applicants were qualified, thereby resolving in favor of RAETA the hotly contested issue of whether that applicant was financially qualified. (I.D., Concls. 60-65.)

(which was later to become the principal factor in the Commission's decision, long after the dismissal of RAETA's application) the Examiner found that five applicants were superior to RAETA-RTI. But she gave no indication as to how she would rank those five among themselves.

#### F. Appeal and Remand - 1964-65

Exceptions to the Initial Decision and briefs in support of those exceptions were filed with the Commission in April 1964. The Commission heard oral argument on November 2, 1964, at which time the parties were permitted to comment on a petition to reopen the record that had been filed on October 15, 1964, by all of the applicants except RAETA and RTI. This petition asserted that the need for educational programming, which was the basis for the Examiner's award to RAETA-RTI, had been substantially diminished by the Commission's establishment of an Instructional Television Fixed Service and by the decision (on October 8, 1964) of the Rochester School District to apply for authority to construct and operate such a system. The petition contended that the Commission should re-open the record and provide for a further hearing in the light of these developments; it also suggested that inquiry be made at the remanded hearing as to why use was not being made of the UHF channel that the Commission had reserved for educational telecasting in Rochester.

On May 13, 1965, six months after the oral argument, the Commission reopened the record and ordered a further hearing on "questions which give the Commission some concern." The order stated these questions as follows (FCC 65-403, ¶2):

"(a) whether alternative means are available for the broadcast of the type of educational programming which RAETA proposes; and (b) whether a share-channel applicant such as RTI would provide an effectively competitive outlet for a third network

service, including the question whether the American Broadcasting Company would affiliate with such an applicant."

The order indicated, however, that the inquiry at the remanded hearing would range also into the areas of qualifications of principals, planning and preparation, and proposed programming. The Commission expressly declared that the scope of the further hearing was to be inferred from the language of the remand order rather than from specific issues, saying that "The nature of the further hearing ordered herein does not lend itself to the designation of specific, additional issues." (FCC 65-403, ¶10, and fn. 6.)

With respect to qualifications of principals, the remand order indicated that a further comparison would be made at and after the remanded hearing. It directed all parties to up-date their applications within 90 days to reflect involuntary changes such as those resulting from death or disability of principals. It declared that "the backgrounds of any replacements should be set forth so that the comparative qualifications of the applicants may be fully evaluated. . . . In this manner, further comparison of the applicants will be more meaningful and more reflective of the present realities." (FCC 65-403, ¶7.)

With respect to programming and planning, the remand order invited the applicants to re-assess community needs and to revise their programming plans accordingly. It declared expressly that consideration would be given to the comparative criterion of planning and preparation:

"We invite changes in the program proposals which have been advanced in the several applications. The ever-changing needs of a community such as Rochester may now be somewhat different from those needs ascertained by the applicants several years ago. If, during the 90-day period provided herein, some of the applicants determine that the needs previously ascertained by them are reflective of present needs, they

may so indicate when the material up-dating their applications is submitted. If others find that the needs are different from those previously ascertained by them, the programming proposals in these instances may be modified to reflect any changes.. What may be done with regard to ascertainment of present needs in the Rochester area will, of course, have some bearing upon the planning and preparation comparative criterion. This is to be expected, for ascertainment of needs necessarily entails elements of planning and preparation. We believe that the 90-day period provided herein is ample for these purposes."

Because the Examiner who had presided at the hearing had retired, the Commission assigned the remanded proceeding to another Examiner, who was directed to conduct the remanded hearing as expeditiously as possible and issue a document in the nature of a supplemental initial decision. (FCC 65-403, §§ 9-10.) As it turned out, however, the remanded hearing was never held. Soon after the remand order was issued, two events occurred that eventually caused the Commission to cancel the remanded hearing. The first was the dismissal of RAETA's application. The second was the issuance by the Commission of a new policy statement prescribing the criteria applicable in comparative cases.

#### G. Effects of the Dismissal of RAETA's Application

On October 1, 1965, RAETA requested leave to dismiss its application in exchange for reimbursement of its expenses by the other applicants. This was approved by the Commission's Review Board in an order released January 24, 1966. (FCC 66R-28.) RAETA used the funds obtained as reimbursement to construct a non-commercial, educational television station on a channel reserved for educational use. That station, WXXI, is now operating on Channel 21 in Rochester. (Decision, §2.)

The dismissal of RAETA's application created dispute and uncertainty as to whether RTI should be treated as an applicant for fulltime facilities or as an applicant proposing only part-time use of the channel. On July 28, 1966, the Commission rejected an RTI amendment specifying fulltime operation on the ground that RTI should not be permitted to improve its competitive posture during the course of the hearing. (FCC 66-593.) But in its Decision of August 3, 1967, the Commission reversed itself, saying that it was permitting RTI, "without altering its comparative qualifications" to amend its application to specify fulltime operation. (Decision, ¶6(e).) The Decision did not, however, specify what limitations, if any, were imposed on RTI in the comparative evaluation; nor did it explain what was meant by the phrase "without altering its comparative qualifications."

The dismissal of RAETA's application also had an impact on the status of the other parties, for it removed from the case the applicant which the Examiner had used as the standard against which all others were measured. It eliminated the premise on which the Examiner had based her conclusions.

#### H. Policy Statement on Comparative Hearings - 1965

The up-dating amendments called for by the remand order were filed on November 30, 1965, the time having been extended past the originally prescribed 90-day period. In the meantime, on July 28, 1965, the Commission promulgated its Policy Statement on Comparative Hearings (hereinafter "Policy Statement.") (1 F.C.C.2d 393, 5 R.R.2d 1901.)

In the Policy Statement, the Commission restated--and, in important respects, revised--the criteria applicable in comparative cases. The Commission described the Policy Statement as a "general review of the criteria governing the disposition of comparative broadcast hearings" that was intended to be useful to the Commission's Hearing Examiners, its Review

Board, and the parties appearing before the Commission. The Commission declared in the Policy Statement that pending cases, as well as future cases, "will be decided under the policies here set forth."

The policies set forth in the Policy Statement differed to some extent from the policies that were implicit in the issues in the instant case, that had been applied in the Initial Decision, and that had been reiterated in the remand order that had been issued just two months earlier, on May 13, 1965. For example, the Policy Statement was explicit that no comparative issue would ordinarily be designated on program plans and policies. And it provided that a past broadcast record would be given substantial significance as a comparative factor only if it was unusually good or unusually bad. The Hearing Examiner had considered both proposed programming and past broadcast record, but not in the terms now prescribed by the Policy Statement.

In other important respects, the Policy Statement reiterated long-established Commission policy. It stressed the importance of diversified ownership of mass communications media. It declared that the factor of "Full-time participation in station operation by owners" (which the Examiner, in her Initial Decision, had called "Integration of Ownership and Management") was of substantial importance. The Policy Statement noted, however, that "no credit will be given to the participation of any person who will not devote substantial amounts of time on a daily basis." Further, the Policy Statement indicated that the factors of local ownership and broadcast experience would be considered as sub-factors of integration and that local residence would weigh more heavily than broadcast experience. The Examiner had considered broadcast experience separately and had considered local ownership as a sub-factor under the separate criterion of area familiarity.

The Policy Statement specifically re-affirmed earlier statements by the Commission <sup>1/</sup> and by this court <sup>2/</sup> as to the obligation of applicants to familiarize themselves with community needs and to gear program proposals to those needs. It went further, however, and declared that failure to make contacts with local civic groups and individuals as a means of formulating proposals to meet the area's needs and interests "will be considered a serious deficiency, whether or not the applicant is familiar with the area."

### I. Cancellation of Remanded Hearing - 1966

On April 21, 1966, the Commission cancelled the remanded hearing. (FCC 66-347.) In this same order, the Commission also rejected the amendments that it had, just five months earlier, invited the applicants to file after re-assessing community needs. Two bases were stated for this action: First, the dismissal of the RAETA application, which the Commission had formally approved three months before; and Second, the changes in the comparative criteria effected by the Policy Statement, which had been promulgated nine months before. The order quoted the provision in the Policy Statement that:

"...[N]o comparative issues will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will not be taken under the standard issue."

and it went on to recite that:

"... all matters of decisional significance in this proceeding are in the present record, ... further

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- 1/ The reference was to the Commission's July 27, 1960 "Report and Statement of Policy Re: Commission en banc Programming Inquiry," 20 R.R. 1901.
  - 2/ The Commission cited Henry v. F.C.C., 122 U.S. App. D.C. 257, 302 F.2d 191 (1962), cert. denied, 371 U.S. 821.

hearings would serve no useful purpose, and ... it would be more conducive to the Commission's orderly processes for the Commission to decide this proceeding on the basis of the present record; ...."

#### J. Further Commission Proceedings - 1967.

Over a year passed before the Commission announced any further action in the case. And during this period the parties began to disagree among themselves as to the appropriate course for the Commission to take.

On March 2, 1967, ten months having passed since the cancellation of the remanded hearing, four of the applicants--Flower, Citizens, Star and Community--filed a "Petition for Prompt Resolution of Case". They reported that efforts to resolve the case through merger had failed. They suggested that the task of deciding the case would be simplified if the Commission, without preparing a written final decision, would merely issue an order "naming those applicants whom it feels are approximately equal from the standpoint of qualifications to receive the grant, and naming those who are not in the running for a grant." These four applicants stated that they were reasonably sure that, with the field thus narrowed, those named as potential grantees could rapidly effect a merger. The petition further stated that those named as not in the running would be assured of being reimbursed, with the Commission's approval, a substantial part of their hearing expenses. The petition urged that if the suggested procedure was not adopted, then the case should be resolved at the earliest possible time "by the usual method of issuing a final decision selecting a single winning applicant."

Three parties--Federal, Heritage, and Main--responded on March 27, 1967, with a joint pleading of their own. They challenged the legality of the procedure proposed by Flower, Citizens, Star, and Community but declared their continuing interest in a merger. They requested that the Commission encourage further merger efforts. They urged that, if no merger agreement

were filed within a time period prescribed by the Commission, then the Commission should "employ its customary and required process of selecting a single winning applicant."

On April 12, 1967, the four petitioners replied that, in view of the opposition to their proposal, "the Commission should resolve this case at the earliest possible time by the usual method of issuing a final decision selecting a single winning applicant." On April 20, 1967, RTI filed comments stating that the Commission had been wrong in refusing to permit RTI to amend its application to specify fulltime operation after the dismissal of the RAETA application.<sup>1/</sup> RTI also charged that the Commission "has abdicated its function of deciding cases by its long delay in this case and is on the point of inviting mandamus in court because of its refusal to decide."

Although none of the parties had requested further oral argument, the Commission's response to this exchange of pleadings was an order, released April 28, 1967, calling for further oral argument on May 22, 1967. The order stated that (FCC 67-518):

"Although an oral argument before the Commission en banc, was held in this proceeding on November 2, 1964, a number of events have occurred since that date which may have a bearing upon the determination to be made herein. Under these circumstances, a further oral argument permitting the parties to address themselves to the remaining issues in this proceeding would assist in the orderly dispatch of the Commission's business."<sup>2/</sup>

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1/ See pages 75-78, infra.

2/ By this time, the Commission had formally established the procedure of having appeals from Initial Decisions in all comparative cases considered by the Review Board, with discretionary review thereafter by the Commission. See 2 R.R.2d 1571 (1964.) However, this procedure was not followed in the Rochester case, presumably because it antedated the establishment of the Review Board and the Commission had already heard oral argument in the case once.

The order did not identify the "events" that had occurred since the first oral argument that might have a bearing on the decision. One of them, undoubtedly, was the dismissal of the RAETA application. Another, presumably, was the sale by a principal of Star of his interests in existing Rochester AM and FM stations. But the order was not explicit as to whether these were among the events the Commission had in mind, or as to what other events it had in mind. Nor did the order identify the "remaining issues in the case" to which the parties were to address themselves.

The oral argument was held on the designated date, May 22, 1967; and on August 3, 1967, the Commission released its Decision. Five of the seven Commissioners participated, and they split three to two. Dissenting Commissioner Bartley voted for Federal; dissenting Commissioner Johnson expressed dismay at the entire process but indicated that his preference was for Community.

On September 5, 1967, pursuant to Section 405 of the Communications Act (47 U.S.C. §405), Community, Citizens, Federal, Heritage, Genesee, Main, and RTI filed petitions for reconsideration. These were denied by Memorandum Opinion and Order released November 29, 1967. (FCC 67-1276.) The vote on reconsideration was four to two, with Commissioners Bartley and Johnson again dissenting.

#### K. Applicants' Proposals for Integration of Ownership and Management

The Decision hinged, ultimately, on the comparative criterion of Participation in Station Operation by Owners, or Integration of Ownership and Management. The crucial part of the Decision was ¶8, which is quoted below in its entirety:

"On this important factor all of the applicants, with the exception of Genesec and Heritage, propose fulltime participation by a

substantial percentage of the stock ownership, but none, with the exception of Federal, proposes to have more than one-half of the ownership interest represented in fulltime station operation. Genesee has no fulltime participation by any person with an ownership interest and Heritage has almost none. Federal has 100% integration of ownership with management. In addition, Federal's participation is by a long term local resident with many years of radio experience. Federal therefore is to be substantially preferred over the other applicants on this factor. Among the other parties with substantial integration, Flower ranks the highest, in view of the broad broadcasting, and particularly television, experience of G. Bennett Larson, and of the somewhat lesser broadcast experience of Gordon Auchincloss, II. We recognize that the integration of Flower is not accompanied by past local residence, and that in this respect it is not the equal of RTI, Star, Main and Federal. However, in view of the fact that the great majority of Flower's stock is held by persons with area familiarity and the further fact that the great majority of its stock is also held by persons who will devote some time to the operation of the station, as is also true of most of the other applicants, we do not believe that in this particular case the absence of past local residence by the two stockholders participating fulltime in the operation of the station is so significant. In addition, as we noted in the Policy Statement, persons participating fulltime in station operation by definition will become local residents. In view of our conclusions, we do not believe further ranking of the other parties, some of whom are very close, is necessary on this issue."

The Decision did not give any further details concerning Larson and Auchincloss, nor did it identify the principals whom the other applicants proposed to involve in station operation.<sup>1/</sup> The Examiner, however, made detailed findings of fact as to the applicants' integration proposals, and the Commission adopted those findings in its Decision. They are summarized briefly

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<sup>1/</sup> Two of the applicants with substantial integration, Citizens and Community, were not even mentioned in ¶8. In fact, the only reference to Citizens in those paragraphs of the Decision entitled "Evaluation of Comparative Criteria" was the statement in footnote 9 (¶7) that "the facts with respect to ... Citizen's connection with a local FM station are not sufficient to warrant an adverse conclusion...."

below. Since the Policy Statement treats local residence and broadcast experience as sub-factors of the integration criterion, the findings as to those factors are also noted. Also, since the Decision (although not the Policy Statement) attributed significance to part-time participation in station operation, these facts are summarized too.

Flower: G. Bennett Larson, a 10% stockholder, would be employed full-time as executive vice-president and general manager. (I.D., ¶9.) Gordon Auchincloss, II, an 8.33% stockholder would be employed full-time as vice president and program director. (I.D., ¶11.) Neither Larson nor Auchincloss is a resident of Rochester, but both proposed to move there in the event of a grant. (I.D., ¶5.) Auchincloss had lived in the Rochester area for three months on 1945 (I.D., ¶¶11, 211); he is related by marriage to the Sibley family, whose members own a total of 20.83% of Flower's stock (including his 8.33%) (I.D., ¶6.) Larson had never been in Rochester, except in transit, prior to September 18, 1961, three days before Flower's application was filed. (I.D., ¶211.) Larson had experience in broadcasting in various capacities from 1926 to 1959. From 1953 to 1959, he was president, general manager and 20% owner of the licensee of KDYL radio and KDYL-TV in Salt Lake City, Utah. Since that time he has worked as a station broker in Los Angeles. He has not been employed in broadcasting, or had any broadcasting experience, since 1959. (I.D., ¶9.) <sup>1/</sup> Except for a brief stint as a teenager in 1935, Auchincloss has never worked for a station. His broadcast experience consisted of writing and producing programs, largely network entertainment programs. (I.D. ¶11.) <sup>2/</sup> Nineteen other stockholders of Flower, all

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- 1/ The facts as to Larson's present employment are well-known and undisputed. They were alluded to at the oral argument on May 22, 1967, and in the petitions for reconsideration filed after the Decision. (See T. 9924.)
  - 2/ See pages 62-64, infra, for a description of how Larson and Auchincloss came together and the manner in which they prepared Flower's program proposal on September 19, 1961.

local residents, owning a total of 48.8% of the stock, plan to devote varying amounts of time to the station, ranging from one hour per week to two days per week. (I.D., ¶¶7-8, 12-20, 22-32.)

Star: Maurice R. Forman, a 32.5% stockholder <sup>1/</sup> would devote fulltime to the station as chief executive officer. (I.D., ¶48.) <sup>2/</sup> Four other stockholders, owning a total of 4.5%, would be employed fulltime in the capacities of sales manager, chief engineer, reporter-announcer, and news director. (I.D., ¶¶55, 57, 58, 60.) All are local residents and have had radio broadcast experience, including experience in radio stations in Rochester. (I.D., ¶¶48, 55, 57, 58, 60.) At the time of the hearing, Forman controlled radio station WBBF (AM and FM) in Rochester, WGVA in Geneva, New York, and WTLB, in Utica, New York. (I.D., ¶48.) All of these have now been sold. (Decision, ¶¶6(b), 7.) Five other stockholders, all local residents, representing 8.5% of the total stock ownership, will devote varying amounts of time ranging from two to ten hours per week. (I.D., ¶¶52, 53, 56, 59, 61, 62.)

Community: F. Robert Greene (15%) <sup>3/</sup> and Michael R. Hanna (14%) would devote fulltime to the station. (I.D., ¶¶68, 77.) It is unclear, however, whether or not the Commission, in its comparative evaluation, considered

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- 1/ At the time of the hearing, Forman was a 19.5% stockholder. (I.D., ¶48.) In an amendment filed May 18, 1967, Star advised that he had acquired an additional 13% from two other stockholders. (I.D., ¶6(b).) In addition, he votes the 14% owned by his late brother (I.D., ¶4.)
  - 2/ Actually, the finding was "approximately 40 hours per week," but the Commission treats this as fulltime. For example, it was found that Federal's sole stockholder "will devote approximately 40 hours a week to his duties as general manager of the television station" (I.D., ¶130), and this was regarded as fulltime participation by 100% of the ownership in both the Decision (¶8) and the order denying petitions for reconsideration. (FCC 67-1276, ¶2.)
  - 3/ At the time of the hearing, Greene's commitment depended on some extent on the outcome of a pending application for an AM station at Depew, New York. That is no longer a factor. (Decision ¶5(c).)

Hanna as a fulltime participant in Community's proposed station. 1/ For its part Community has always contended that he should be so considered. Neither Greene nor Hanna lives in Rochester, but both proposed to reside there as employees of Community's proposed station (I.D., ¶¶69, 77.) Greene, although a resident of the Buffalo area, had been 50% owner and general manager of a combined AM and FM station in Rochester from 1956 to 1959. (I.D., ¶¶74, 76.) In its Decision, the Commission concluded that his record of performance in Rochester during this period was "commendable." (Decision, ¶11.) Greene has also had broadcast ownership management experience, dating back to 1934, in other communities. (I.D., ¶¶71-76.) Hanna has been general manager of the Cornell University stations, WHCU-AM-FM, at Ithaca, New York, since 1940. (I.D., ¶¶78-81.) 2/ Six other stockholders, all local residents, owning a total of 43% of the stock, plan to devote varying amounts of time to the station, ranging from two to ten hours per week. (I.D., ¶¶67, 82-86.)

Citizens: Lawrence P. Fraiberg, a 20% stockholder, would be employed fulltime as vice president and general manager. (I.D., ¶144.) William A. Fay, a 10% stockholder, would devote at least 15 hours weekly, and full-

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- 1/ At the time of the hearing, Hanna was committed to take a minimum leave of absence of six months from his managerial duties at the Cornell University stations, WHCU-AM-FM, at Ithaca, New York, to take over his duties as Community's director of education and public affairs. (I.D., ¶77.) The Decision noted that the Commission had been advised on May 16, 1967, that he would completely sever his connection with WHCU-AM-FM in order to take this position with Community. (Decision, ¶6(c).) However, in its November 29, 1967, order denying petitions for reconsideration, the Commission said that these facts regarding Hanna "could not be, and were not, given any weight in our comparative evaluation of the applicants in this proceeding." (FCC 67-1276, ¶7, fn. 2.) See fn. 2, infra.
  - 2/ On March 7, 1968, Community tendered for filing with the Commission an amendment to its application noting that Hanna has now resigned from the Cornell station, effective June 30, 1968.

time if necessary, to the operation of the station as president. (I.D., ¶141.)<sup>1/</sup> George S. Driscoll, a 3% stockholder, would be employed as chief engineer fulltime. (I.D., ¶155.) Fay and Driscoll are residents of Rochester. Fraiberg was in Rochester for the preparation of Citizens' application; and between October 1961 and June 1962 he spent most of his time there. He, too, like Larson of Flower, proposes to move to Rochester in the event of a grant. (I.D., ¶144.) Also, like Larson, he has had broadcasting experience. Fraiberg's television experience dates from 1949 and continues to the present. In 1963, he became manager of WTTG(TV) in Washington, D.C., (I.D., ¶144), and is now manager of WNEW-TV in New York City. (T. 9943.)<sup>2/</sup> Fay was engaged in broadcasting in Rochester from 1929 to 1957. He was employed as manager of radio station WHAM in Rochester in 1939 and of its TV counterpart in 1949; he retained these positions until the stations were sold in 1957. (I.D., ¶142.) Driscoll has been employed in broadcasting in Rochester in various capacities since 1928. (I.D., ¶155.) Nineteen other stockholders of Citizens, representing 65% of the stock, will devote varying amounts of time to the station, ranging from three to 12 hours per week. (I.D., ¶¶145-53, 157-66.)

Federal: As the Commission noted, Federal proposes 100% integration of ownership and management and was ranked ahead of all other applicants on this factor. (Decision, ¶8.) Its sole stockholder, Gordon P. Brown, would be the general manager of the station. He has been a resident of Rochester all of his life and has been actively engaged in broadcasting there since 1925. (I.D., ¶¶131-35.)

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- 1/ On September 5, 1967, Citizens submitted an amendment to its application noting that Fay was, in fact, committed to devote fulltime to the station. This amendment was rejected in the order denying petitions for reconsideration. (FCC 67-1276, ¶7, fn.2.)
  - 2/ The citation is to the oral argument of Citizens' attorney on May 22, 1967. The facts as to Fraiberg's present employment are well known and have been formally called to the Commission's attention on several occasions, including the petitions for reconsideration filed after the Decision, the oral arguments, and the up-dating amendment filed by Citizens on November 30, 1965.

Heritage: Dorothy Livadas, a 2% stockholder, would devote 40 hours per week, or fulltime, to her program advisory committee assignments on women's programming, cultural affairs, and news. (I.D., ¶119.) Seven other stockholders, all local residents, owning a total of 22% would devote from ten to 20 hours per week to the station. (I.D., ¶¶93, 97, 98, 108, 113, 115, 118.) Nine other stockholders, all local residents, owning a total of 36%, will devote various amounts of time to the station, ranging from three to eight hours per week, each having a program advisory committee assignment. (I.D., ¶¶102, 104-06, 109, 111, 112, 116, 117.)

Genesee: Genesee has 18 stockholders, all of them local residents active in civic activities. (I.D., ¶¶34-46.) Its proposed general manager, Gunnar O. Wiig, a director but not a stockholder, was employed in broadcasting from 1927 to 1961. His broadcast experience includes managing radio and television stations in Rochester. (I.D., ¶45.) Genesee stockholders owning a total of 52.16% of its stock will serve with Wiig as directors, meeting monthly. Genesee also has general plans for the establishment of a planning board, composed of the general manager, all department heads, and designated members of the board of directors. (I.D., ¶¶34, 36.) As a matter of policy, Genesee has eschewed committing any stockholder to devote any specific number of hours per week to the station. (I.D., ¶36.)

Main: Leon Halperin, a 50% stockholder<sup>1/</sup> and local resident, would devote 40 hours per week, or fulltime, as general manager of the station. (I.D., ¶124.) Main proposes to maintain constant contact with members

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<sup>1/</sup> In addition to his original 25% interest, Halperin acquired on August 8, 1967, the 25% interest of his wife, Beatrice Halperin, who died on September 20, 1967. The Commission was notified of this by an amendment tendered for filing on October 30, 1967. Prior to her death, Mrs. Halperin had been slated to be the station's director of education and women's programs, devoting 20 hours per week to those duties. (I.D., ¶125.)

of an advisory committee, whose members will not be stockholders.

(I.D., ¶338.) All of Main's stockholders are local residents. (I.D., ¶122.)

RTI: George E. Mercier, 30% stockholder, would devote 40 to 50 hours weekly, or fulltime, as president and general manager of the station (I.D., ¶168.) The four remaining stockholders, representing 70% of the stock, propose to devote varying amounts of time to the station, ranging from three to ten hours per week. (I.D., ¶¶168-72.) All of RTI's stockholders are local residents. (I.D., ¶167.)

#### L. Summary of Factors Considered by the Commission

The Commission found that the Examiner's findings of fact were substantially accurate and complete. It noted, however, that since the Examiner had favored the share-time proposal of RAETA-RTI, substantially different conclusions and different ultimate results were required.

The Commission majority's "Evaluation of Comparative Criteria" encompasses six paragraphs and little more than four pages. The majority concluded, first, that all other applicants were entitled to an equal preference over Federal on the "very important" criterion of Diversification of Control of the Media of Mass Communications (Decision, ¶7), while Federal was "substantially preferred" over all the others under the criterion of Participation in Station Operation by Owners. (Decision, ¶8.) The Commission then concluded that, among the other parties with substantial integration (i.e., all but Federal), Flower ranked highest "in view of the broad broadcasting, and particularly television, experience of G. Bennett Larson [a 10% stockholder proposed as Flower's fulltime General Manager], and of the somewhat lesser broadcast experience of Gordon Auchincloss, II [an 8.33% stockholder proposed as Flower's fulltime Program Director]." As to the criterion of Past Broadcast Record, the Commission awarded Community a preference over all the other

applicants for the "commendable record of performance" of station WHAM in Rochester under the management and 50% ownership of F. Robert Greene (a 15% stockholder in Community proposed as its fulltime General Manager] (Decision, ¶11.) The Commission concluded that none of the applicants was entitled to a preference for preparation and planning, staffing, program policies and proposals, or efficient use of the channel. (Decision, ¶¶9, 12.) Heritage was faulted because of the connection of Bernard Birnbaum (President and 2% stockholder of Heritage) with another corporation that had been the subject of adverse action by the Securities and Exchange Commission. (Decision, ¶12.) Summing up, the majority preferred Flower to Federal "because of Federal's existing broadcasting interests" and preferred Flower to Community "because of Flower's superiority in the area of participation in station operation."

In its order denying petitions for reconsideration released November 29, 1967, the Commission's majority dealt, briefly, with the contentions of some parties that there had been no effective Initial Decision. See pages 84-92,infra. But, as noted in more detail at pages 37-40, infra, it made no specific reference to the parties' claims of preference under the comparative criteria or to their contentions regarding the application of the comparative criteria--for example, that the Commission should have taken into consideration under integration the fact that Flower's Larson had had no broadcast experience for the past nine years, that it should have taken into consideration under diversification an interest in a broadcast station recently acquired by Flower's president, that it had violated the Policy Statement by weighing broadcast experience more heavily than local residence in applying the integration criterion, and that it had violated the Policy Statement by not treating as "a serious deficiency" Flower's failure to survey community needs before filing its application.

Nor did the order denying petitions for reconsideration make any specific reference to Heritage's objection that the demerit assessed against it was improper or to the many other contentions that the parties had advanced to support their own applications or to support their proposals for further proceedings. In fact, the order denying petitions for reconsideration was, for the most part, merely a summary of what had already appeared in the Decision, coupled with a recitation that all contentions had been considered and rejected.

#### STATUTES INVOLVED

The provisions of 5 U.S.C. §557 (formerly Section § of the Administrative Procedure Act) and Section 409(a) and (b) of the Communications Act of 1934, as amended (47 U.S.C. §409(a) and (b)) are set out in the Appendix to this brief.

Also, for the convenience of the court, the Commission's Policy Statement on Comparative Hearings, released July 28, 1965, and reported at 1 F.C.C.2d 393 and 5 R.R.2d 1901, is set out in the Appendix.

#### STATEMENT OF POINTS

1. The Commission is required by statute (5 U.S.C. §557) and by the requirements of fundamental fairness (as applied, for example, in Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) and Greensboro-High Point Airport Authority v. CAB, 97 U.S. App. D.C. 358, 231 F.2d 517 (1956)) to resolve all issues, take into consideration all material differences among the applicants, respond to the parties' claims and contentions, and make findings and conclusions that explain the bases of its decision and the process of reasoning by which it was reached. In this case, the Commission failed to do

any of these things, and its failure is most notable in its treatment of the parties' claims and contentions respecting integration of ownership and management, the most crucial comparative factor in the case.

2. The Commission was obliged to, but did not, make findings and conclusions on the duly designated issues calling for a comparison of the applicants' program proposals and their responsiveness to ascertained public needs.

3. Having declared the Policy Statement to be the standard or norm for decision, and having purported to apply it, the Commission could not violate or depart from it without explanation or justification.

4. The Commission violated the Policy Statement, without explanation or justification, in assigning more weight to broadcast experience than to local residence under the comparative criterion of integration of ownership and management.

5. The Commission also violated the Policy Statement, without explanation or justification, in considering the participation of Flower's stockholders who would devote less than fulltime to station operations.

6. The Commission also violated the Policy Statement, without explanation or justification, in failing to assess Flower a comparative demerit for the "serious deficiency" in its planning and preparation.

7. The Commission erred in failing to take into consideration, and give weight to, Flower's failure to make any survey of needs or any contacts in the community before formulating its program proposal.

8. In applying the diversification criterion, the Commission was obliged to consider Federal's commitment to dispose of its existing stations.

9. The Commission erred in failing to give weight to the recent acquisition of an ownership interest in a broadcast station by the leading principal of Flower.

10. The Commission did not give fair and adequate consideration to RTI's fulltime proposal.

11. The acceptance of RTI's fulltime proposal required further proceedings, so that the other parties could test that proposal in a hearing.

12. The Commission erred in acting on a stale and outdated record and in failing to grant requests for further hearing.

13. The Commission erred in ignoring uncontradicted evidence showing that changes in the television industry since 1959 diluted the value of Larson's pre-1959 management experience.

14. The Commission acted arbitrarily and contrary to the public interest in ignoring proposals for merger and mediation.

15. As held in Channel 16 of Rhode Island, Inc. v. FCC, 97 U.S. App. D.C. 179, 229 F.2d 520 (1956), an initial decision, to be valid and effective, must contain conclusions as well as findings of fact. The Initial Decision in this case was invalid as lacking in conclusions in that the Examiner did not apply the comparative criteria to all of the applicants but, instead, merely compared the RAETA-RTI combination to the other applicants. As a result, the other applicants were effectively deprived of their statutorily guaranteed right to file exceptions.

16. Even if the Initial Decision were valid when issued, it became invalid, ineffective and meaningless with the dismissal of RAETA's application. This occurrence changed the entire climate and context of the case. As a result, the parties have been effectively deprived of their statutorily guaranteed right to have a Hearing Examiner pass upon their proposed findings and conclusions addressed to the factual situation as it actually exists.

## SUMMARY OF ARGUMENT

### I.

The comparative criterion of ownership participation in station operation, or integration of ownership and management, was the most significant factor in the case. It was the stated basis for the Commission's preference of Flower over all other applicants except Federal. But the preference was merely stated; it was not explained. The Commission's discussion of the applicants' integration proposals was perfunctory and unenlightening. Thus, the Commission said that it preferred Flower because of the broadcast experience of Larson and Auchincloss, but it did not explain how, or on what basis, Flower's proposed integration of Larson and Auchincloss into station management distinguished it from other applicants which also proposed owner-managers with broadcast experience. The Commission did not explain the process of reasoning by which it concluded that Larson's broadcast experience, which ended in 1959, was superior to that of another applicant's proposed owner-manager, who has current and continuing experience as a television station manager. Nor did it explain on what basis or for what reasons Flower's integrated stockholders were preferred to those of other applicants whose proposed owner-managers not only had broadcast experience but had gained that experience in Rochester.

The Commission did not take note either of the similarities or of the differences in the applicants' integration proposals. It made no reference to the bases on which various applicants claimed preferences for integration, nor did it discuss their contentions with respect to Flower's proposed integration. In fact, two of the applicants that had vigorously claimed preferences for integration were not even mentioned in the Commission's brief discussion of that factor, nor were any of the proposed owner-managers themselves mentioned, except Larson and Auchincloss of Flower.

The Commission's failure to disclose the bases for its choice was a violation of the statutory requirement that it resolve all issues and give an adequate statement of the reasoning by which it arrived at its decision. Decisions of the Supreme Court, this court, and other circuits have insisted on this a minimum requirement of fundamental fairness. Parties in an administrative proceeding have a right to have their applications and claims fairly considered and to know the basis on which the agency granted or denied them. In this case, the Commission's unenlightening discussion of integration deprived the appellants of this right and forces them--and the court--to speculate as to the basis for the Commission's conclusion on the most important issue in the case.

## II.

The issues duly designated for hearing directed that a comparison be made of the applicants' program proposals. They further directed that the program proposals be considered and compared in the light of (1) Whether there are particular types or classes of programs for which there is an unfulfilled need in the area proposed to be served, and (2) The extent to which the program proposal of each applicant would meet such needs.

The Commission refused to make any conclusions on these issues, holding that the differences in the various program proposals were minor and insignificant and that the inquiry into special needs had become moot with the dismissal of the RAETA application. The Commission was wrong on both counts. The program proposals of the applicants are not identical. One applicant, for example, proposed 24-hour service. Moreover, the public's need for particular types or classes of programs did not dissolve with the dismissal of RAETA's application. In fact, RAETA's evidence showed as much need for public affairs and discussion programs as for purely educational programs.

Several applicants claimed preferences for their programming proposals and for their efforts to ascertain the public's programming needs. One applicant in particular claimed a preference for designing programming specifically responsive to existing unfulfilled needs, ascertained through a meticulous survey. It presented extensive evidence concerning the survey and the needs it disclosed. Other applicants also claimed preferences for their extensive surveys, and they also introduced evidence to support their claims. The Commission ignored this evidence and these claims and made no findings or conclusions respecting programming or needs.

This was error. The Commission is not free to disregard duly designated issues or real and substantial differences among the contending applicants. Programming is the very essence of a television station's service, and differences in applicants' programming proposals, and in their responsiveness to public needs, must be evaluated in the comparative process.

### III.

The Commission's Policy Statement was the norm or standard which it declared applicable and which it purported to apply. But, in fact, the Commission violated the Policy Statement in at least three important respects.

First, in evaluating the applicants' integration proposals, it gave more weight to broadcast experience than to local residence. This was completely contrary to clear and unambiguous provisions in the Policy Statement. Second, despite the Policy Statement's declaration that no consideration would be given to anything less than fulltime participation of stockholders in station operation, the Commission relied on the "some time" participation of some of Flower's stockholders as a basis for holding that local residence was not a significant factor in this case. This, too, was contrary to the Policy Statement. Finally, in an especially shocking departure from the Policy Statement, the Commission

refused to give any weight to the "serious deficiency" in Flower's planning and preparation.

The Policy Statement requires applicants to make contacts with local civic groups before formulating their program proposals. It provides, in express terms, that a failure to do so "will be considered a serious deficiency, whether or not the applicant is familiar with the area." (Emphasis added.) Flower did not make any such contacts before formulating its program proposal. Instead, that proposal was drawn up by Larson and Auchincloss in a Washington, D.C., law office three days before it was filed with the Commission. At the time, they knew nothing about Rochester, its needs, or its civic organizations. They did not know their fellow stockholders, and they did not know each other. Flower indisputably deserved a comparative demerit for this performance, and it was a violation of the Policy Statement for the Commission to refuse to take this "serious deficiency" into consideration.

The Commission's power to change or revise the comparative criteria (which is, in any event, not an unlimited power) is not in issue. What is in issue is whether the Commission can, without any justification or explanation whatsoever, declare a particular standard or norm or formula to be applicable--and then depart from it. This court and other courts have made clear on numerous occasions that it may not do so.

#### IV.

The Commission failed to rule upon numerous contentions and proposals advanced by the parties. Federal, for example, never received even an acknowledgment of its commitment that it would, if the Commission required it, dispose of its existing broadcast interests in the event of a grant of its television application. This was a matter of the most critical importance to

Federal, because the existence of Federal's other broadcast interests was the only reason why the Commission chose Flower over Federal. The Commission did take into consideration the post-hearing sales of broadcast stations by principals of other applicants, and it was arbitrary not to take into consideration Federal's commitment to do the same.

The Commission also erred in failing to give weight to the acquisition of a broadcast interest by the leading principal of Flower. Diversification of control of mass communications media is the most important of all the Commission's comparative criteria, and in a close case the Commission is not free to ignore other broadcast interests, however small they may be and however distant they may be from the city in which new interests are sought.

The Commission has not dealt fairly with the fulltime proposal of RTI. The dismissal of RAETA's application left RTI with only a part-time proposal. The Commission refused to permit RTI to amend its application until it issued its Decision, at which time it said that it was accepting RTI's amendment "without altering its comparative qualifications." This is, quite literally, meaningless. The Commission gave no indication that it had given RTI's fulltime proposal any real or substantial consideration. Moreover, if it had done so, it would have violated the rights of other applicants, who have never had an opportunity to test RTI's fulltime proposal in a hearing.

There were, in addition, numerous other contentions of the parties which the Commission ignored. It paid no heed to the requests for further hearing, despite the staleness of the record and the many changes that had occurred since 1952, when the last evidence was taken. Particularly arbitrary was its failure to acknowledge the uncontradicted showing that the television industry had changed so substantially since 1959 that Larson's pre-1959 broadcast experience should, accordingly, be given little weight. Also, the Commission acted arbitrarily and without due regard to the public interest in

ignoring proposals that it use its good offices to effect a merger or that it act as a mediator to resolve this long-pending case.

V.

The Hearing Examiner's Initial Decision did not apply the comparative criteria so as to produce a ranking of all of the applicants. Instead, the Examiner merely compared the RAETA-RTI combination to all of the other applications and concluded that it was superior. As a result, the Initial Decision lacks the most essential ingredients of a valid initial decision--i.e., conclusions. It is, therefore, invalid and ineffective. This serious defect was timely raised in the exceptions to the Initial Decision. The defect was jurisdictional and could not have been waived by the parties; and, in fact, it was not waived.

Even if the Initial Decision were valid when rendered, it became invalid, ineffective, and meaningless when RAETA's application was dismissed. The disappearance of RAETA from the case rendered the Examiner's conclusions moot and changed the entire climate and context of the case.

The absence of a valid and meaningful initial decision--i.e., an initial decision containing findings and conclusions and applying the comparative criteria to all applicants--deprived the parties of their statutorily guaranteed right to file exceptions. Moreover, they have also been deprived of their right to have proposed findings of fact and conclusions considered by a Hearing Examiner, because the proposed findings and conclusions submitted in 1963 were addressed to a factual situation that no longer exists.

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For the reasons stated, the decision of the Commission must be reversed and the case remanded to the Commission for further proceedings in accordance with law.

## ARGUMENT

### I. THE COMMISSION VIOLATED STATUTORY REQUIREMENTS AND LONG-ESTABLISHED PRINCIPLES OF FAIRNESS IN FAILING TO ARTICULATE ADEQUATE AND INTELLIGIBLE REASONS OR BASES FOR ITS CONCLUSIONS REGARDING THE APPLICANTS' PROPOSED INTEGRATION OF OWNERSHIP AND MANAGEMENT

There were substantial differences among the applicants with respect to integration of ownership and management. Correspondingly, the applicants had substantially different contentions with respect to integration. The Commission's Decision and its order denying petitions for reconsideration took virtually no note of the differences and gave little indication as to the bases on which the contentions were disposed of. Thus, while the Commission told appellants that they lost, it did not tell them why. It did not rule on their individual claims for preferences for their integration proposals, it did not explain or justify its departure from established policy regarding integration, it did not deal with their specific contentions regarding Flower's proposed integration.

Appellants were entitled to more; and so, for that matter, was this court. Appellants and the court were entitled to a decision that gives "a plain answer" to the parties' contentions, Greensboro-High Point Airport Authority v. C.A.B., 97 U.S. App. D.C. 358, 362, 231 F.2d 517, 521 (1956), and to Commission rulings that "make the basis of its action reasonably clear." Radio Station KFH Co. v. F.C.C., 101 U.S. App. D.C. 164, 166, 247 F.2d 570, 572 (1957.) The Commission cannot brush them off with a decision that contains "no findings and no analysis ... to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962.) The courts must reverse where "the Commission has not adequately explained its departure from prior norms and has not sufficiently

spelled out the legal basis of its decision." Secretary of Agriculture v. United States, 347 U.S. 645, 653 (1954.)

The crucial part of the decision is §8, in which the majority awarded Flower a preference over all applicants except Federal in the all-important criterion of integration of ownership and management. And the crucial part of §8 is the statement that Flower is preferred because of "the broad broadcasting, and particularly television, experience of G. Bennett Larson, and the somewhat lesser broadcast experience of Gordon Auchincloss, II." But the parties and the court are left to speculate as to why Flower's integration proposal was regarded as superior to that of other applicants whose owner-managers also had broadcast experience. For example, the Commission's majority did not indicate the process by which they reached the conclusion that the broadcast experience of Larson and Auchincloss of Flower was preferred to that of Fraiberg, Fay and Driscoll of Citizens (or, for that matter, of Fraiberg alone), or of Forman of Star, or of Greene and Hanna of Community. Larson's broadcast experience dated back many years, but so did that of Fay, Greene and Hanna. Larson had managed a television station, but so had Fraiberg and Fay. Moreover, Fay and Greene had managed broadcast stations in Rochester. The Decision does not indicate how these differences--and similarities--were evaluated.

The parties have received no answer to contentions that were the very essence of their claims of superiority over Flower. On what basis, for example, did the Commission prefer Flower to Citizens, which proposed an owner-manager with a 20% stock interest (greater than that of Larson and Auchincloss combined) and with current, and continuing, television experience, whereas Larson had been out of the field for eight years? On what basis did it prefer Flower to Star, whose principal figure, Forman, had both broadcast experience (including experience in Rochester) and local residence? The Commission did not undertake to answer these contentions. Indeed, two

of the applicants that claimed a substantial preference over Flower for integration, Citizens and Community, are not even mentioned in ¶8, which contains the entire discussion of integration. And no principals of any applicant are mentioned in that discussion, except Larson and Auchincloss of Flower.

Citizens made a particular point of contending that its integration proposal should be preferred to Flower's because Fraiberg, now the manager of WNEW-TV in New York City and formerly the manager of WTTG(TV) in Washington, D.C., has recent and current management experience, whereas Larson has been out of the field since 1959. Citizens urged this point at oral argument (T. 9943, 9949) and in its petition for reconsideration. One of its principal points in requesting reconsideration was that television had changed so substantially during the eight years Larson has been out of it that the Commission should discount Larson's experience accordingly, especially as compared to the recent and continuing television experience of Citizens' Fraiberg. Citizens asked the Commission to use its expertise or its power of official notice to take note of the changes in television that had occurred during Larson's absence from the field. Citizens detailed some of the changes that had occurred during that nine-year period--the scope and methods of audience research, audience composition, film buying, programming in "fringe-time" (from late afternoon to about 7:30 p.m. and after 11:00 p.m.); use of videotape; presentation of "specials"; ability of television to affect the news as well as to report it. Citizens contended that, "The needs and requirements of today's television industry would not be familiar to a person who has been out of it for over 8 years." Citizens supported its contentions with an affidavit from one John G. Johnson, president, director and a stockholder of the corporate licensee of several broadcast stations, including WGHP-TV, Channel 8, High Point, North

Carolina.<sup>1/</sup> Main's petition for reconsideration also contended that the Commission should reconsider the significance of Larson's pre-1959 television experience in evaluating the parties integration proposals. These contentions were not disputed, nor could they have been. But the order denying petitions for reconsideration took no note of them.

The order denying petitions for reconsideration also made no reference to Community's vigorous objections to the statement in the Decision (¶13) that Community's participating stockholders, like those of Flower, lacked area familiarity. Community insisted that its proposed general manager, Greene, should not be regarded as lacking area familiarity since he had been the 50% owner of WHAM and WHFM in Rochester from August 1956 to April 1959, had participated in Rochester civic activities during this period, and had in fact been credited in the Decision with a "commendable" record of performance. The order denying petitions for reconsideration took no note of this, but merely repeated what had already been said in the Decision--that Community's participating stockholders, like those of Flower, "also lack area familiarity."

The Commission's response to the comparative points urged in the petitions for reconsideration was summary and perfunctory. In the unusual circumstances of this case, this was highly prejudicial to appellants. Except for the oral argument on May 22, 1967, at which each applicant was allowed 20 minutes to presents its view of the comparative factors, the petitions for reconsideration were the only opportunity the applicants had to

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1/ The television market of Greensboro-Winston-Salem-High Point, North Carolina, ranks 47th in net weekly circulation. Rochester ranks 70th. The ranking of television markets by net weekly circulation, although done by the American Research Bureau, a private organization, has official status in the Commission's rules. See 47 C.F.R. §74.1107(a).

address the Commission on the comparative situation as it existed after the dismissal of the RAETA application and the issuance of the Policy Statement. Their exceptions to the Initial Decision and their briefs in support of exceptions had been filed almost four years earlier, in an entirely different climate and context. But the Commission's brief order denying petitions for reconsideration shed no more light than did the Decision itself on the bases for the Commission's choice of Flower, or on the process of reasoning by which it reached its ultimate conclusion in the case, or on its disposition of the parties' contentions.

The question on these appeals is not whether the Commission was right or wrong in preferring Flower but whether it complied with legal requirements in doing so. Clearly, it did not comply with the plain statutory command of 5 U.S.C. §557 (formerly Section 8(b) of the Administrative Procedure Act), which directs that, "All decisions ... shall include a statement of ... findings and conclusions, and the reasons therefor, on all material issues of fact, law, or discretion presented on the record...." The language of the Supreme Court in Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962), is applicable to the Commission in this case. In Burlington, the Court overturned a determination made by the Interstate Commerce Commission that it would respond to a particular need for service by certificating a new carrier rather than by issuing a cease and desist order to existing carriers. The Court said (371 U.S. 156, 167-168; emphasis added):

"There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See Siegel Co. v. Federal Trade Comm'n, 327 U.S. 608, 613-614. Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the

strength of modern government, can become a monster which rules with no practical limits on its discretion.' New York v. United States, 342 U.S. 882, 884 (dissenting opinion.) 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' Federal Communications Comm'n v. RCA Communications, Inc., 346 U.S. 86, 90. The Commission must exercise its discretion under §207(a) [the statutory provision authorizing a new certification] within the bounds expressed by the standard of 'public convenience and necessity.' Compare *id.*, at 91. And for the courts to determine whether the agency has done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. Interstate Commerce Commission v. J-T Transport Co., 368 U.S. 81, 93; United States v. Carolina Carriers Corp., 315 U.S. 475, 488-489; United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 511. Here the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carriers and the public. Nor did it articulate any rational connection between the facts found and the choice made. The Commission addressed itself neither to the possible shortcomings of §204 procedures [authorizing a cease and desist order to the existing carriers], to the advantages of certification, nor to the serious objections to the latter. ...."

This court has applied the same principles. For example, in Braniff Airways, Inc. v. CAB, 113 U.S. App. D.C. 132, 306 F.2d 739 (1962), it reversed a decision of the Civil Aeronautics Board awarding a contested route to one of two airlines. The court held that the full basis of such a decision must be spelled out, especially where the applicants have nearly equal qualifications. Compared to the Commission's expressions in the instant case, the CAB's statement of the reasons for its choice in Braniff was remarkably definite and specific. But it was not definite and specific enough to be legally sufficient. The court said that, "In this situation the court requires in the

interest of fairness that the Board's decision adverse to Braniff be supported in a manner which enables the court to review the correctness of the conclusion reached on the basis of findings, as well as on the adequacy of the record to support the findings." (113 U.S. App. D.C. 136, 306 F.2d 743.)

This court has ruled to the same effect in numerous decisions involving a variety of agencies and involving adjudication as well as rule making. See Commonwealth of Puerto Rico v. Federal Maritime Bd., 110 U.S. App. D.C. 17, 288 F.2d 419 (1961); Michigan Consolidated Gas Co. v. FPC, 108 U.S. App. D.C. 409, 283 F.2d 204 (1960); Radio Station KFH Co. v. FCC, 101 U.S. App. D.C. 164, 247 F.2d 570 (1957); Mississippi River Fuel Corp. v. FPC, 102 U.S. App. D.C. 238, 163 F.2d 433 (1957); Greensboro-High Point Airport Authority v. CAB, 97 U.S. App. D.C. 358, 231, F.2d 417 (1956.)

Although all of the above-cited cases were decided under the Administrative Procedure Act, the principle involved rests on a much broader basis than that statute alone. Indeed, one of the classic formulations of the principle was Justice Cardozo's statement in 1935, long before the Administrative Procedure Act was passed, in United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499, 510-511, in which an administrative determination was overturned even though the Court was well aware of plausible reasons that the agency could have given to support it:

"The difficulty is that it [the Interstate Commerce Commission] has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. Beaumont, S. L. & W. R. Co. v. United States, 282 U.S. 74, 86; Florida v. United States, 282 U.S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

The Administrative Procedure Act was not involved either in this court's decision in Spiegel v. P.U.C., 96 U.S. App.D.C. 307, 226 F.2d 29 (1955), and Capital Transit Co. v. P.U.C., 93 U.S. App. D.C. 194, 213 F.2d 176 (1953), both of which emphasized that the court must have an adequate statement of the bases for the agency's action, and the reasoning supporting that action, before it can perform its appellate function.

Spiegel illustrates the point. It was a rate case in which the agency's findings could have supported either of two kinds of rate base. The court did not undertake to tell the agency what choice to make, but it insisted that its choice be supported by an adequate statement of reasons:

"We are not here expressing a judgment as to what rate base the Commission should have adopted. That is not our function; we could not substitute our view on such a question--if we had reached a view--for that of the Commission.. Nor are we saying that the Commission may not ultimately be able to justify its adoption of the original cost rate base, if it decides to adhere to that course. But we do say that the decision of the Commission must be based on a 'suitably complete statement' of its reasons for its conclusions.

"Concluding as we do, that the report and order of the Commission do not reflect an adequate statement of its reasons for adopting the original cost rate base, we must reverse..." (226 F.2d 33; citations omitted.)

These principles have also been consistently applied in other circuits. See for example, NLRB v. Tallahassee Coca-Cola Bottling Co., Inc., 381 F.2d 863 (5th Cir. 1967); Austin v. Jackson, 353 F.2d 910 (4th Cir. 1965); Northeast Airlines, Inc. v. CAB, 331 F.2d 579 (1st Cir. 1964); Anglo-Canadian Shipping Co., Ltd. v. Federal Maritime Board, 310 F.2d 606 (3rd Cir. 1962); In re United Corporation, 249 F.2d 168 (3rd Cir. 1957.) Moreover, they have been applied by this court to comparative broadcast proceedings at the Federal Communications Commission both before and after passage of the Administrative Procedure Act. Radio Station KFII v.

F.C.C., 101 U.S. App. D.C. 164, 247 F.2d 470 (1957); Saginaw Broadcasting Co. v. F.C.C., 68 App. D.C. 282, 96 F.2d 554 (1938); Tri-State Broadcasting Co., Inc. v. F.C.C., 68 App. D.C. 292, 96 F.2d 564 (1938).

Tested by these principles, the Commission's decision in this case cannot stand. The Commission has said little more than that it preferred Flower's integration proposal to that of the other parties (except Federal); but it has not indicated the bases for that conclusion, nor has it disclosed the process of reasoning by which it was arrived at. Did the Commission really conclude that Larson's pre-1959 television experience was more impressive than Fraiberg's current and continuing experience? And, if so, what consideration did it give to the changes in television that have occurred since 1959? In holding that Community was similar to Flower in that its integrated stockholders lacked area familiarity, what consideration did the Commission give to Greene's experience in Rochester in the period 1956-1959? On what basis did the Commission prefer Flower to Star, whose proposed owner-manager had both broadcast experience and local residence? Having found that Federal was preferable to Flower because of its 100% integration, just how did the Commission evaluate integration in quantitative terms from that point on, in view of the fact that Flower proposed to integrate stockholders owning only 18.33% of its stock while Main proposed 50%, Star 37%, RTI 30%, Citizens 33% and Community 29%. In view of the fact that the Commission took into consideration the time to be spent by Flower's non-fulltime stockholders (in addition to the fulltime commitments of Larson and Auchincloss), on what basis did it prefer Flower to the other applicants that proposed to have a substantial percentage of their stockholders devote "some time" to the station? How did the Commission distinguish the "some time" proposal of Flower from that of Heritage, which proposed to have 60% of its ownership devote "some time" to the station, including one stockholder

who would devote a full 40-hour week? And, why was Larson's no-risk contractual arrangement with Flower (under which he paid for a 20% stock interest with a guarantee of reimbursement if Flower loses) essentially different from Genesee's contractual arrangement with its proposed general manager, who would work pursuant to a contract but without any stock interest?

These are not merely rhetorical questions. In a very real sense, these questions are what the case was all about, at least insofar as integration was concerned. The Commission's Decision did not begin to answer these questions. Indeed, it did not even recognize the existence of most of them. And the order denying petitions for reconsideration added nothing by the ritual recitation that "we have again reviewed our Decision in light of petitioner's present contentions and we are convinced that they have presented no reason which warrants a departure from the findings and conclusions contained in that Decision." As the Third Circuit put it in In re United Corporation, 249 F.2d 168, 181 (3rd Cir. 1957), "A bare conclusion is insufficient even when prefaced by a statement that it was reached after careful consideration of all the evidence, as here." Or, as this court stated in Mississippi River Fuel Corp. v. FPC, 102 U.S. App. D.C. 238, 163 F.2d 433, 451 (1957), "The Commission cannot, and we do not understand it to claim it can, shield arbitrariness by averments of its own infallibility, by technical expressions, or by failure to state adequate reasons for its conclusions." What this court said in Greensboro-High Point Airport Authority v. CAB, 97 U.S. App. D.C. 358, 362-63, 231 F.2d 517, 521-22 (1956), is applicable to each of the appellants in this case:

"Despite these considerations, the fact remains that Greensboro has not received a plain answer to its charge of discrimination. We think it is entitled to one. The issue was flatly raised, and was relevant to the Board's ultimate determination as to what the

public convenience and necessity required. The Board's failure to supply an answer was not harmless error, but prejudiced Greensboro's position in its efforts to obtain judicial review. We think the Board should now make appropriate findings of fact on the issue, and state 'the reasons or basis' for its conclusion."

Appellants do not suggest to this court that it substitute its judgment for that of the Commission; they do urge the court to require the Commission to support and explain its judgment in the manner required by law. Appellants do not suggest that all of the contentions noted herein should have prevailed below; they do urge that none of them should have been ignored below. Appellants recognize that it is not the function of the court to make a comparative evaluation of the applicants; but they respectfully submit that it is the function of the court to require the Commission to comply with the Administrative Procedure Act and to act with fundamental fairness. In this case, as in the other cases cited herein, the administrative action must be reversed and the case remanded for further proceedings in accordance with law.

## II. THE COMMISSION VIOLATED THE RIGHTS OF APPLICANTS AND ACTED CONTRARY TO THE PUBLIC INTEREST IN FAILING TO RESOLVE DESIGNATED ISSUES CONCERNING THE PROGRAMMING NEEDS OF THE PUBLIC AND THE PROGRAMMING PROPOSALS OF THE PARTIES

The Commission is directed by 5 U.S.C. §557 to resolve "all the material issues of fact, law, or discretion presented on the record." Moreover, when mutually exclusive applications are under consideration, the Commission is required as a matter of fundamental fairness and administrative due process to take into consideration all material differences between the parties and to resolve their claims for preferences in the comparative evaluation. See Johnston Broadcasting Co. v. FCC, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949.)

The Commission violated these requirements in many respects, not least by refusing to take into consideration evidence that had been presented and contentions that had been made under subsections (c) and (d) of the standard comparative issue relating to programming and the needs of the public. As pointed out at pages 4-5, supra, in April of 1962, shortly after the applications were designated for hearing, the Commission enlarged the standard comparative issue. As originally designated, that issue contained subsection (c), which called for a comparison among the applicants in the light of

"(c) The programming service proposed in each of the above-captioned applications."

As enlarged, the issue also contained subsection (d), which went further and called for a comparison among the applicants in the light of

"(d) The programming service proposed in each of the applications considered in the light of the following factors:

- (1) Whether there are particular types or classes of programs for which there is an unfulfilled need in the area proposed to be served.
- (2) The extent to which the program proposal of each applicant would meet such needs."

In its Decision of August 3, 1967, the Commission held that in the area of programming, as in the area of preparation and planning, no applicant was entitled to a preference over any of the others. (Decision, ¶9.) With specific reference to programming, the Commission said (Decision, ¶3):

"From our consideration of the record in this proceeding, we are persuaded that each of the applicants has met its obligations in this respect and that variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs. As we stated in the Policy Statement, such ordinary differences in judgment will not be compared in the hearing process when each of the applicants, as here, has demonstrated that it is able to carry out its proposal."

The Commission's statement that the variations in the applicants' program proposals were "merely differences in the proportions of time allocated for varying types of programs" was nothing more than a bare conclusion totally unsupported by any specific factual findings or evaluation of the applicants' program proposals. It is patently insufficient to meet the requirements of procedural due process. S.E.C. v. Chenery Corp., 332 U.S. 194 (1947.) Moreover, it was factually wrong and unsupported by substantial evidence. Star, for example, had consistently claimed a preference for its proposal to present a 24-hour television service, whereas Flower and the other applicants proposed to sign off at or around midnight or 1:00 a.m. The Examiner noted this but concluded that "no preference is awarded since the operating schedule of each of the applicants is adequate." (I.D., Concl. 55.) Although Flower did not--since it could not--claim a preference for its programming or its preparation and planning,<sup>1/</sup> several other applicants did. Heritage claimed a preference for proposing substantially more live (i.e., locally originated) programming than any other applicant. Federal claimed a preference for proposing less commercial programming (and more network programming) than other applicants. The Examiner took note of these differences in her Initial Decision, but she concluded that none of these commercial applicants was entitled to a programming preference over the RAETA-RTI combination. (Ibid.) She did not, however, compare the programming proposals of these applicants, as among themselves. The Commission, for its part, did not even take note of any of these differences, either in its Decision or in its order denying petitions for reconsideration.

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1/ For a discussion of the inadequacy of Flower's preparation and planning, see pp. 61-68, infra.

The Commission's sole reference to subsection (d) of the standard comparative issue was to dismiss it as moot. The reference came in a footnote to the above-quoted language in §3 of the Decision. It was as follows (Decision, §3, fn. 2):

"Because of RAETA's specialized programming proposal, the standard comparative issue in this proceeding was enlarged to determine whether there were particular types or classes of programs for which there was an unfulfilled need in the Rochester area and the extent to which that need would be met by each applicant, FCC 62-385, released April 13, 1962. Since, as noted above, RAETA's applications has been dismissed and Station WXXI has commenced operation, the evidentiary showings submitted with respect to RAETA's specialized proposal are now moot."

But RAETA was not the only applicant to submit evidence and claim a preference under subsection (d). Star, Genesee, Citizens, Community, and Federal all stressed their surveys of community and area needs and claimed a preference in that regard over other applicants, and specifically over Flower. Their contentions respecting planning and programming were renewed in the oral argument on May 22, 1967, and in petitions for reconsideration.

Star in particular asserted throughout the proceeding--to the Examiner, to the Commission on exceptions and brief, and to the Commission on both oral arguments--that it was entitled to a preference under subsection (d).<sup>1/</sup> Star introduced comprehensive and detailed evidence showing the exact

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<sup>1/</sup> This consolidated brief must, perforce, contain numerous references to contentions made below by only one of the appellants, or by only some of them. Appellants do not necessarily contend that all of these contentions should have prevailed below; they are not urging the court to substitute its judgment for that of the Commission. Appellants do contend, however, that the Commission had an obligation to consider all contentions and to weigh all points of difference and that its failure to do so was reversible error.

manner in which its survey was conducted, the needs it deduced from the survey, and the programming proposals it formulated to meet those needs. Star showed, for example, that it had surveyed the entire nine-county area officially designated as the Rochester Economic Region, had broken down community and area activities into 18 separate categories (Industry and Commerce, Labor, Cultural Resources, etc.), and had conducted detailed interviews with community leaders throughout the area about their organizations' programming needs and resources. Star's evidence further showed that it had carefully developed a program proposal especially designed to meet the needs it had previously determined.

The basic thrust of Star's case was that its evidence showed the existence of unmet needs in three significant categories and that its program proposal would meet those needs better than that of any other applicant. Star claimed, first, that there was a need for 24-hour programming and that the need was particularly acute in the outlying counties which, it claimed, Flower and some other applicants had largely ignored in their program planning. Star also claimed that there was a need for a comprehensive and independent news service; and it claimed that its proposals to meet this need were superior to those of any other applicant, including Flower. Star also claimed that there was an extraordinary need for information and discussion programs, including numerous programs expressing editorial opinions and disseminating the different or contrary opinions of others. Here, too, Star claimed that its proposals entitled it to a substantial preference.

In its appeal to the Commission from the Examiner's Initial Decision, Star devoted the bulk of its exceptions and brief to its claim for a preference for ascertaining unmet needs and devising programming to respond specifically to those needs. Star claimed that, "No other applicant has so well assayed the service area's needs or proposed a service so well designed to meet them."

("Brief in Support of Exceptions of Star Television, Inc., " p. 19.) Moreover, Star claimed expressly that it was entitled to a preference over Flower in this respect. (Id., pp. 20-21.) The following quotation gives the purport and flavor of Star's contentions (Id., p. 21):

"Star (and some of the other applicants, to be sure) must be given a strong preference vis a vis Flower City in the area of ascertaining needs and preparing a proposal to meet them. The fact is that Flower City's basic programming (as distinguished from detailed content of specific program titles) was thrown together without any effort to ascertain the local needs the proposal purports to meet. The proposal made is one which is equally--even more--suitable to meet the needs in Denver, New York City or Hollywood than it is to meet those in Rochester."

This claim of preference was made in April of 1964, before the issuance of the Policy Statement and while RAETA was still in the case. However, Star renewed it at the second oral argument on May 22, 1967. The order calling for that oral argument stated that its purpose was to permit the parties "to address themselves to the remaining issues in this proceeding." (FCC 67-518 .) No indication was given in the order that subsections (c) and (d) of the standard comparative issue would be regarded as no longer in the case. At the oral argument that followed that order, Star's counsel, far from regarding planning and programming as out of the case, asserted that "the most important element to be weighed by the Commission is the area of ascertaining needs and of proposing programs to meet these needs." (T. 9890-91.) The principal thrust of his oral argument was the contention that there were crucial differences among the applicants with respect to ascertaining needs and proposing programming to meet those needs, and that Star was entitled to a decisive preference over all other applicants in those areas of comparison. (T. 9890-93, 9896, 9969-73.)

At the May 22, 1967, oral argument, and later in petitions for reconsideration, other applicants also claimed a preference for preparation and planning and for programming. See, for example, the argument of Genesee's counsel at T. 9883 and of Citizens' counsel at T. 9949-51. The Commission did not resolve these claims, nor did it make any conclusions under subsections (c) and (d). It merely held, without explanation and without findings, that there were no significant differences among the applicants with respect to subsection (c) (programming) and that subsection (d) (special needs) had been rendered moot by the dismissal of RAETA's application.

Although Star did not petition for reconsideration (but, instead, appealed directly to this court), other parties did file petitions for reconsideration asserting preferences in the areas of planning and programming and asserting also that Flower's failure to make any survey of area needs before preparing its program proposal should have been treated as "a serious deficiency", as required by the Policy Statement. <sup>1/</sup> Community, for example, captioned a six-page segment of its petition for reconsideration as follows: "The Commission's Refusal to Consider Substantial Evidence of Record Showing the Serious Deficiency in Flower's Ascertainment of the Area's Needs and Interests was Squarely in Conflict with its Policy Statement on Comparative Criteria and was an Arbitrary and Capricious Rejection of a Lawfully Necessary Factor in Comparative Evaluations." (Community's "Petition for Reconsideration and for Other Relief", p. 19.) Citizens also raised the matter expressly in its petition for reconsideration, captioning its argument, "The Commission was in error in failing to consider preparation and planning a factor of decisional significance and in failing to award a preference to Citizens because of its superiority in this factor." (Citizens' "Petition for Reconsideration and Rehearing", p. 22.)

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1/ See p. 61, infra.

In its order denying petitions for reconsideration, the Commission made no reference to these (and other) contentions regarding programming, preparation and planning. Nor did it refer at all to Flower's failure to survey area needs. Subsections (c) and (d) of the standard comparative issue were again ignored entirely.

In failing to resolve issues that had been duly designated for hearing, and in failing to take into consideration significant differences among the parties' program proposals and their efforts to ascertain the public's program needs, the Commission not only seriously prejudiced those parties that claimed comparative preferences for programming and planning; it also abandoned its own obligations to the public interest. Nearly 20 years ago this court stressed that in comparative proceedings, the relative merits of program proposals are an important, even vital, factor of measurement in the public interest. Plains Radio Broadcasting Co. v. FCC, 85 U.S. App. D.C. 48, 175 F.2d 359 (1949). In fact, the Plains case involved a virtually identical situation where the Commission, as here, in purportedly comparing various program proposals failed to make any findings whatsoever upon what the respective program proposals actually contained. The court reversed and remanded the proceeding to the Commission with specific instructions to make findings on the respective program proposals.

Equally important, the Commission's holding that evidentiary showings under the "unfulfilled programming needs" issue were rendered moot in view of the dismissal of RAETA's application is also completely untenable. The Commission, in effect, is saying that this designated comparative issue was added solely for RAETA's benefit and that when RAETA withdrew from the proceeding, the issue had no legal force or effect. But public needs for particular "types or classes of programs" (to use the language of subsection

(d)) did not dissolve with the dismissal of RAETA's application. RAETA's own evidence under subsection (d) showed needs for public affairs and discussion programs as well as for strictly educational programs. If, as Star and other applicants contended, there were unmet public needs, then the Commission had an obligation to the public to consider proposals to meet those needs. Moreover, the applicants themselves have rights that the Commission was not free to ignore. Surely, there can be no serious question that once a particular comparative issue has been included in a proceeding, the Commission must evaluate and make specific findings upon evidentiary showings made by competing applicants directed to that issue. Under 5 U.S.C. §557, the Commission is plainly required to make findings and conclusions on all the material, factual and legal issues presented. Minneapolis & St. Louis Ry. Co. v. United States, 361 U.S. 173 (1959.) Material differences between applicants on a particular comparative issue cannot be brushed aside and ignored as the Commission has done here. Johnston Broadcasting Co. v. FCC, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949.)

### III. THE COMMISSION'S DEPARTURES FROM CLEAR AND UNAMBIGUOUS PROVISIONS OF THE POLICY STATEMENT, THE NORM WHICH IT HAD DECLARED APPLICABLE AND WHICH IT PURPORTED TO APPLY, WERE ARBITRARY AND CAPRICIOUS, UNEXPLAINED; AND UNJUSTIFIED

The Policy Statement declared that it would apply to all pending cases. The Decision in the instant case does purport to apply it. But, in fact, it departs from it substantially and drastically. It does so by holding that broadcast experience weighs more heavily than local residence as a sub-factor under the integration criterion. The Policy Statement had held just the opposite. The Commission also violated the Policy Statement by permitting Flower to benefit from the proposed participation of stockholders who would

devote less than fulltime to station operation. Finally, and most significant of all, the Commission violated the Policy Statement in failing to penalize Flower for its wholly inadequate preparation and planning.

A. The Commission Violated the Policy Statement by Assigning More Weight to Broadcast Experience than to Local Residence

The Commission acknowledged that Flower's proposed integration was inferior to that of RTI, Star, Main, and Federal in that each of them proposed owner-managers who were residents of Rochester, while Larson and Auchincloss of Flower were non-residents. (Decision, ¶8.) Nevertheless, Flower was preferred, despite the Policy Statement's clear provision that in evaluating integration, broadcast experience is "not so significant as local residence" and "will be deemed of minor significance."

The Policy Statement reflected innumerable Commission decisions in emphasizing the importance of ownership participation in management as a comparative factor. But it went further and resolved in express terms the choice that would be made when Applicant A proposed an owner-manager who had not resided in the community but had gained broadcast experience elsewhere and Applicant B proposed an owner-manager who was a local resident but lacked broadcast experience. When it issued the Policy Statement, the Commission had no doubt at all about the choice. It opted clearly and unambiguously for local residence over broadcast experience.

In awarding Rochester Channel 13 to Flower, and in basing that award primarily on the proposed integration of Larson and Auchincloss, the Commission indisputably departed from the clear provisions of the Policy Statement. The award in the instant case holds, in effect, that broadcast experience is more important to integration than local ownership, the very opposite of the clearcut, unequivocal declaration in the Policy Statement.

It is true, of course, that Larson and Auchincloss propose to become local residents if Flower's application is ultimately granted. But the Policy Statement dealt with that consideration also. It declared that, "Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration."

"Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While ... integration of ownership and management is important per se, its value is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs on the basis described above by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs. 7/ Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management.

"Past participation in civic affairs will be considered as part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the community. Mere diversity of business interests will not be considered. Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration.

"Previous broadcasting experience includes activity which would not qualify as a past broadcast record, i.e., where there was no ownership responsibility

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"7/ Of course, fulltime participation is also necessarily accompanied by residence in the area."

for a station's performance. Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage, 8/ it will be deemed of minor significance. It may be examined qualitatively, upon an offer of proof of particularly poor or good previous accomplishment." (Emphasis added.)

"8/ Lack of experience, unlike a high concentration of control, is remediable. See Sunbeam Television Corp. v. Federal Communications Commission, 100 U.S. App. D.C. 82, 243 F.2d 26 [15 R.R. 2001.]"

There is no basis in the Decision or in the order denying petitions for reconsideration for assuming that the Commission intended its actions in this case to constitute a revocation or abandonment of the Policy Statement. To the contrary, the Decision cites the Policy Statement and purports to apply it. Moreover, while it is conceivable that the award of a preference to Flower over Main and RTI might reflect a flat rejection of the Policy Statement's provisions that local ownership is more significant than broadcast experience in evaluating integration, that speculation would not explain the preference for Flower over Star, whose integrated stockholder, Forman, had both local residence and broadcast experience. The Commission's treatment of integration stands, therefore, as an unexplained departure from the clear and unambiguous provisions of the Policy Statement.

B. The Commission Violated the Policy Statement by Considering the Participation of Stockholders Who Would Devote Less than Fulltime to Station Operation

The Policy Statement was equally explicit in holding that no credit would be given for the participation of anyone "who will not devote the station substantial amounts of time on a daily basis," although a slight credit, one of minor significance, would be given for the local residence of those "who will devote some time to station affairs."

It is by no means clear whether or not the Commission credited Flower with the participation of those stockholders who would devote some time, but not fulltime, to station affairs. ¶8 of the Decision is, to say the least, ambiguous and confusing on the point. However, the majority clearly relied on "some time" participation to some extent, for it used it as the basis for concluding that "in this particular case" the absence of past local residence by Flower's participating owner-managers is not significant. The stated justification for this was that "the vast majority of Flower's stock is held by persons with area familiarity and ... the great majority of its stock is also held by persons who will devote some time to the operation of the station." This was followed, however, by the concession that this was "also true of most of the other applicants." In fact, as shown in the summaries on pages 21-26, supra, the great majority of the stock of all applicants is locally owned. Moreover, it is true of at least five of the applicants with whom Flower was being compared--Star, Community, Heritage, Citizens, and RTI--that the great majority of their stock was held by persons who will devote some time to station operation. But the only conclusion the Commission drew from these facts related to Flower alone. This does not begin to explain, of course, the basis on which Flower was preferred to other applicants -- for example, to Citizens and Community, which also proposed experienced, non-resident owner-managers who would work with local stockholders owning a majority of the corporation's stock and were pledged to devote some time to the station.

Nor is this part of the Decision adequately explained by the penultimate sentence of ¶8, in which the Commission's majority said that, "in addition, as we noted in the Policy Statement, persons participating fulltime in station operation by definition become local residents." For this was true also of the managers proposed by the other applicants, and the Decision

gave no indication as to how this provided a basis for preferring Flower. Moreover, this reference is obviously to footnote 7 in the Policy Statement, which appears in context in the quotation on page 57, supra. The context, as the full quotation makes clear, is that broadcast experience weighs less heavily as a sub-factor of integration than does local residence. The Policy Statement dealt expressly with future local residence, saying that "Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration." In short, the Commission did not make clear how the fact that Larson and Auchincloss would become local residents provided a basis for preferring Flower, or for distinguishing its integration proposal from that of other applicants, or for squaring the preference for Flower with the Policy Statement.

Thus, whether or not the majority credited Flower with the proposed participation of stockholders who would devote "some time" to the station, it clearly used Flower's "some time" proposals as a basis for Flower's preference over other applicants on the integration factor. This was a repudiation of the Policy Statement, as was the conclusion to which it led--i.e., that "in this particular case" lack of local residence is not significant. In what case, then, would it be important? Certainly the Policy Statement, with its fully articulated preference for local ownership over broadcast experience and its strictures against giving consideration to participation on anything less than a fulltime basis, precludes using "some time" participation as a premise for downgrading the comparative importance of local residence.

C. The Commission Violated the Policy Statement by Failing to Penalize Flower for its Totally Inadequate Preparation and Planning

The gross arbitrariness of the Commission's decision is nowhere better illustrated than in its failure to assess a substantial demerit against Flower for inadequate planning and preparation. Other parties repeatedly and consistently contended--in proposed findings and conclusions filed with the Examiner, in briefs and exceptions filed with the Commission after the Initial Decision, in the course of oral argument, and in petitions for reconsideration filed after the Decision--that Flower's preparation and planning had been seriously deficient. After the release of the Policy Statement, this contention was based on the following provision of that document:

"The basic elements of an adequate service have been set forth in our July 27, 1960 "Report and Statement of Policy Re: Commission en banc Programming Inquiry," 25 FR 7291, 20 Pike & Fischer RR 1901, and need not be repeated here. And the applicant has the responsibility for a reasonable knowledge of the community and area, based on surveys or background, which will show that the program proposals are designed to meet the needs and interests of the public in that area. See Henry v. Federal Communications Commission, 112 US App 257, 302 F2d 191 [23 RR 2016], cert. den. 371 US 821. Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area." (Emphasis added)

There was in the record an abundance of uncontradicted evidence to support the contentions of other applicants that the Commission should have treated Flower's program planning and preparation as "a serious deficiency." The Examiner made extensive findings on the matter

(I.D., ¶209-11), to which Flower took no exception. The facts, as established in the transcript and in the formal findings of fact were as follows:

Flower's application was filed on September 21, 1961. The proposed program schedule contained in the application had been prepared by Auchincloss and Larson three days earlier, on September 19, 1961, during an eight to ten-hour session in the Washington, D. C., law offices of Flower's counsel. (I.D., ¶210) Larson and Auchincloss had not met each other prior to September 19, 1961, nor was either of them familiar with Rochester on that date. (I.D. ¶211)

No program contacts with persons outside the corporation were made by or on behalf of Flower prior to the filing of its application on September 21, 1961. (I.D., ¶210) A number of program contacts were made with Rochester civic organizations after the original filing, mostly in the two-week period of October 3-17, 1961. (I.D., ¶212)

Flower's proposed program schedule was amended in minor respects on October 31, 1961. (I.D., ¶214-16)

On September 18, 1961, the day before he met Auchincloss in Washington, Larson had gone to Rochester to meet with Harper Sibley, Jr., and two other Flower stockholders. Larson had never been in Rochester before, except in transit. (I.D., ¶211) He and Sibley came together at the suggestion of Flower's Washington, D. C., attorneys, who suggested Larson to Sibley as a possible general manager. (T. 2458, 2554-55) Sibley and his associates were particularly interested in someone who would make a financial

investment in the corporation, and Larson was willing to do so. (T. 2458, 2464) Flower contracted with Larson, however, that if its application is denied, Larson will be reimbursed for whatever amount he has invested in its stock. (I.D., ¶9, fn. 6)

Sibley had learned about the availability of the television channel in early August, when it was mentioned to him by Leonard Goldenson, chairman of the board of the American Broadcasting Company, following a meeting of the board of Western Union, of which they were both directors.

(T. 2444-45) Sibley discussed the matter with Auchincloss, his brother-in-law, who lived and worked in the New York City area. (T. 2267, 2448, 2450-51, 2468-69) Auchincloss did some work on a program schedule during the last week in August in the form of "just ideas and talk" (I.D., ¶210), but he did not actually prepare a draft of a program schedule until September 19, when he met Larson in Washington.

(T. 2310)

As noted, Auchincloss and Larson had not previously met each other, nor was either of them familiar with Rochester at the time, nor had any program contacts yet been made with Rochester civic groups and organizations. (I.D., ¶210-11) In fact, neither Larson nor Auchincloss had yet met even a majority of Flower's 31 stockholders. Larson had met three the previous day, and Auchincloss had met nine or eleven of them. (I.D., ¶211)

On September 20, 1961, the day after his meeting with

Auchincloss in Washington, Larson returned to Rochester and presented the completed program schedule to a meeting of Flower's stockholders, which lasted about two hours. It was approved substantially as presented; and the next day, September 21, 1961, Flower's application was filed with the Commission. (I.D., ¶210)

At every stage of the case, other parties contended that Flower should be assessed a substantial demerit in the comparative evaluation because of this patently inadequate planning and preparation. For example, in its April 1964 brief appealing to the Commission from the Examiner's Initial Decision, Star asserted that Flower's basic programming

"was thrown together without any effort to ascertain the local needs the proposal purports to meet. The proposal made is one which is equally--even more--suitable to meet the needs in Denver, New York City, or Hollywood than it is to meet those in Rochester." (Brief in Support of Exceptions of Star Television, Inc., April 27, 1964, p. 21.)

Flower's deficiencies in this regard were also pointed out at the oral argument on May 22, 1967. (See, for example, T. 9881, 9896, 9950-51.) The matter was also raised in petitions for reconsideration filed after the Decision. Community's petition, for example, asserted as follows ("Petition for Reconsideration and Other Relief," p. 25):

"The issue thus presented by the evidence of record on this matter is not simply one as to whether Flower's efforts to ascertain area needs and interests were comparatively inferior or superior to those of other appli-

cants. 15/ The issue, instead, is whether Flower's efforts met the minimum test enunciated in the Commission's Policy on Programming (20 RR 1901), its Policy Statement on Comparative Hearings (5 RR 2d 1901), and Section IV-B of the application form. Plainly, it did not and, for this reason, Flower must be heavily demerited on the factor of ascertainment of area needs and interests."

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"15/ That they were inferior to Community's and, indeed, to those of at least two other present applicants (Genesee and Star) is plain from the Examiner's findings (See Community Exception F-2, paras. 42-47, pp. 107-110)."

Neither these contentions nor the specific evidence and findings showing Flower's "serious deficiency" were ever mentioned by the Commission. Its Decision merely asserted, in ¶3, that all applicants had met their obligations under the Policy Statement. The provision in the Policy Statement that a failure to make contacts with civic organizations as a means of formulating proposals would be considered "a serious deficiency" was not referred to.

The Commission has long required that broadcast applicants prepare their program proposals in response to ascertained community needs. And this court has upheld the Commission's public interest judgment. In 1960, in its "Report and Statement of Policy Re: Commission en banc Programming Inquiry," 20 R.R. 1901, the Commission noted that station operation required of a broadcaster a "diligent, positive and continuing effort to discover and fulfill the tastes, needs and desires of his community or service area." It said that his obligations "will not be served by pre-planned program format submissions" but only by

"documented program submissions prepared as a result of assiduous planning and consultation" with community leaders and the listening or viewing public in the area to be served.

In 1961, in the case of Suburban Broadcasters, 20 R.R. 951, the Commission denied an unopposed application for a first FM station in Elizabeth, New Jersey, because of the applicant's failure to show that the program proposal had been designed to respond to ascertained community needs. "Communities may differ," the Commission said, "and so may their needs; an applicant has the responsibility of ascertaining his community's needs and of programming to meet those needs." (20 R.R. 962a.) On appeal, this court affirmed, holding that the Commission does have the authority to "require that an applicant demonstrate an earnest interest in serving a local community by evidencing a familiarity with its particular needs and an effort to meet them." Henry v. FCC, 112 U.S. App. D.C. 257, 260, 302 F.2d 191, 194 (1962), cert. denied 371 U.S. 821.

On May 13, 1965, in its remand order in the instant case, the Commission reiterated its insistence that program proposals be formulated in response to ascertained needs. It also indicated, in express terms, that planning and preparation would be one of the comparative criteria considered in the case. Then, in July of 1965, the Commission issued the Policy Statement, declaring expressly that an applicant's failure to make contacts with local civic organizations "will be considered a serious deficiency, whether or not the applicant is familiar with the area." Significantly, the Policy Statement provided that such contacts must be made before the program schedule is prepared. It requires, in fact, that such contacts be used "as an important means of formulating proposals to meet an area's needs and interests." Post-application

contacts, such as Flower made in October 1961, a month after its application was filed, cannot satisfy the clear requirements of the Policy Statement.

Prior to the Policy Statement--for example, in Community Telecasting Corp., 24 R.R. 1 (1962), affirmed sub nom. Community Telecasting Corp. v. FCC, 115 U.S. App. D.C. 181, 317 F.2d 592 (1963)--the Commission had sometimes held that formal contacts and surveys may not be required where an applicant's principals were already familiar with the area through their local residence and civic activities. But in the Policy Statement it declared specifically that a failure to make contacts would be regarded as "a serious deficiency, whether or not the applicant is familiar with the area." (Emphasis added)

The Commission's failure to assign Flower a demerit for this "serious deficiency" was not only a violation of the Policy Statement, it was also contrary to the Commission's actions in other cases. Shortly before its decision in the instant case, the Commission re-emphasized the importance of proper ascertainment of area needs in its decision in a television case involving applicants for a Syracuse, New York, channel. The Commission said (Veterans Broadcasting, Inc., 4 R.R. 2d 375, 413 (1965)):

"Salt City appears to argue that where equality is found among the respective program schedules, the method of the planning and preparation of such schedules is immaterial. Its reasoning is fallacious, however, since the Commission is concerned not so much with the programs initially proposed, as with whether the applicant would be continuously aware of specific as well as general programming needs, and whether he would be reasonably prompt in his responses thereto..."

In the same decision, the Commission downgraded one of the applicants which had followed a procedure in the development of program formats similar to that followed by Flower in the instant case, i.e., interviews with civic groups after the program schedule had been prepared. (See 4 R.R. 2d 402 and cf. I.D., §§212-14.) And, shortly before the Syracuse decision, the Commission had ruled in the Grand Rapids case (Grand Broadcasting Co., 2 R.R. 2d 327, 345, 346, 347) that the "determinative" factor in a comparative case involving competing applications for Channel 13 in Grand Rapids, Michigan--the factor on which its choice of the successful applicant was based--was its superior efforts in the ascertainment of needs. The Syracuse, Grand Rapids, and Rochester cases had commenced at about the same time--the fall of 1961, long before the Policy Statement was promulgated. In the Syracuse and Grand Rapids cases, its provisions regarding the necessity of adequate preparation and planning were of crucial decisional significance. In the Rochester case, those provisions were ignored.

D. The Violations of the Policy Statement Were Arbitrary and Capricious and Without Supporting Reasons

As shown above, the Policy Statement specified definite criteria regarding integration, and the interplay of integration, broadcast experience, and local residence. It also specified definite requirements that applicants make community contacts as part of their obligation to devise programming responsive to ascertained needs, declaring in express terms that a failure to make such contacts would be treated as "a serious deficiency" in a comparative case, even on the part of an applicant with area familiarity.

When it promulgated the Policy Statement, the Commission announced that it would be applied to pending cases. And in the decision

in the instant case, the Commission purported to apply it. But it did not, in fact, do so. As shown above, the decision in the instant case departed from the Policy Statement drastically, and it did so without any explanation or attempted justification. This was reversible error.

It may be assumed arguendo that the Commission had authority to depart from the Policy Statement, or to change its specifications, or to re-evaluate the comparative criteria, or to change the weight assigned to the various comparative factors. But the Commission did not have authority to be arbitrary--it did not have authority to purport to apply the Policy Statement, while actually violating it. If it was the Commission's intention to amend the Policy Statement, or to revise the comparative criteria, then it had an obligation to declare that purpose and explain its reasons. As this court said in Mississippi River Fuel Corp. v. FPC, 102 U.S. App. D.C. 238, 163 F.2d 433, 449 (1957):

"The Commission cannot announce the applicability of a formula and then distort its application by failure to find accurately the factors required by the formula, or by departing from the essential progress of the formula from premise to conclusion. When the Commission announces principles or formulae as applicable, the validity of its order can be determined only by measuring what it does against the principles it announces."

Moreover, when an agency does depart from a previously declared rule, Section 8(b) of the Administrative Procedure Act (now 5 U.S.C. §557) requires that it announce the change of mind and the reasons supporting the change. NLRB v. Tallahassee Coca-Cola Bottling Co., Inc., 381 F.2d 863 (5th Cir., 1967); Rayonier, Inc. v. NLRB, 380 F.2d 187 (5th Cir., 1967).

An unexplained departure from prior norms was also involved in Secretary of Agriculture v. United States, 347 U.S. 645 (1954), where the

Supreme Court overturned an action of the Interstate Commerce Commission. The Court did not reverse because it disagreed with the agency's judgment. It reversed because the agency had not explained the basis for its judgment and particularly because it had not explained its departure from established standards. The facts were complex and technical. Indeed, it is hard to imagine a case in which an agency's expert knowledge, regulatory experience, and broad discretion were more deeply involved. Nevertheless, the Court remanded the case for more explicit findings. Noting that the ICC had several alternatives open to it, the Court said (347 U.S. 652-53):

"It is not necessary now to consider the Commission's power, under appropriate findings, to approve such unloading charges without pursuing one of these courses. In dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions. But we do say that while the Commission has adumbrated the reasons that commended these charges to its approval, the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." (Emphasis added)

The same can be said of the Commission's unexplained and unjustified departures from the Policy Statement in the instant case.

#### IV. THE COMMISSION IGNORED ITS OBLIGATION TO COMPARE THE APPLICANTS FULLY AND FAIRLY, TO TAKE SIGNIFICANT FACTORS INTO CONSIDERATION, AND TO CONSIDER THE APPLICANTS' PROPOSALS AND CONTENTIONS

In preceding sections of this brief, it has been shown that the Commission failed in various respects to resolve the issues and to consider the applicants' program proposals and their commitments for integrating ownership and management. It has also been shown that the Commission violated its own Policy Statement in preferring Flower over all other

applicants (except Federal) for integration and in failing to penalize Flower for its inadequate planning and preparation. It will be shown in this section that the Commission also acted improperly in applying the diversification criterion and in ignoring other proposals and requests of the parties. Indeed, in the case of one applicant, RTI, it is not clear whether the Commission gave it any serious consideration at all.

A. The Commission Improperly Failed to Consider Federal's Contentions Regarding Diversification, Including Its Commitment to Dispose of its Existing Stations

Noting that Federal is the licensee of radio station WSAY in Rochester and that its sole stockholder, Gordon P. Brown, is licensee of radio station WNIA in Cheektowaga, New York, about 70 miles west of Rochester, the Commission awarded each of the other applicants an equal preference over Federal on the "very important" criterion of diversification. (Decision, ¶7.) The Decision said that "While the weight of those preferences is diminished somewhat by the existence of other media of mass communications in the Rochester area, the preferences still must be considered substantial in this proceeding because each of these applicants would provide a new voice in the Rochester area." (Ibid.)

As between Federal and Flower, the majority conceded that Federal was superior to Flower under the integration factor, but added that, "We believe that Flower is to be preferred to Federal because of Federal's existing broadcast interests; we feel that the public's interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal." (Decision, ¶13.) Federal's existing broadcast interests were, therefore,

the sole reason why its application was denied in favor of Flower's. Under these circumstances, if there was a likelihood that this barrier could be removed, then Federal clearly had a right to have that taken into consideration. The fact is that Federal had committed itself to remove this barrier--but its commitment was ignored.

On May 22, 1967, at the second oral argument, Federal's attorney declared his client's willingness to dispose of its Rochester AM station, WSAY. He said (T. 9931):

"He [Gordon P. Brown] has a station in Rochester, and specifically if there is an objection to the station that can be cured. He volunteers and agrees specifically to dispose of that station."

There is no indication in the Decision that the Commission took this declaration into consideration. On page 9 of its petition for reconsideration (filed September 5, 1967), Federal stated formally that it was willing to dispose of Brown's Cheektowaga station as well as WSAY, if that were desired. That petition stated a willingness "to dispose of its stations (particularly its Rochester station) if requested by the Commission on the grant to it of Channel 13." The order denying the petitions for reconsideration made no reference to these statements.<sup>1/</sup>

On the other hand, the Decision does indicate, expressly, that consideration was given under the diversification factor to station sales that had actually been consummated since the closing of the evidentiary record. Thus, the Commission noted that Star's principals had disposed of their

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<sup>1/</sup> By an amendment tendered for filing on March 8, 1968, Federal and its 100% stockholder asserted again that they "will" dispose of WSAY and WNIA upon a grant of the television application.

radio interests in stations in Rochester, Geneva, and Utica and that Greene of Community was no longer connected with an AM application for Depew, New York. (Decision ¶7.)<sup>1/</sup>

This is not a situation where the Commission rejected an applicant's commitment, or found it unpersuasive for some stated reason; rather, this is a situation where a serious and solemn commitment was ignored altogether. If the Commission had some basis for taking into consideration Star's post-hearing sale of stations while at the same time refusing to consider Federal's post-hearing commitment to do the same, it did not state it. In fact, the Commission gave no consideration at all to Federal's contentions regarding the application of the diversification factor in this case. Federal had contended, for example, that the nature of the existing newspaper monopoly in Rochester made it imperative to award the television channel to one with a demonstrated record of opposition to the "establishment." (T. 9932.) Federal had asserted this position with great vigor and consistency throughout the case. The Commission did not reject it or refute it; it merely ignored it. Moreover, the Commission's majority failed to give any answer to the reasoning of dissenting Commissioner Bartley, who concluded that the award should have gone to Federal and that an AM-FM-TV combination should be regarded as a single entity for purposes of the diversification criterion. In a case where the diversification factor loomed so large and was critical to its own status, Federal was indisputably entitled to a "plain answer" to its contentions and commitments. Greensboro - High Point Airport Authority v. CAB, 97 U.S. App. D.C. 358, 231 F.2d 517, 521 (1956).

B. The Commission Was Obliged to Consider, Under Diversification, the Recent Acquisition of a Broadcast Interest by Flower's Leading Principal

In its Decision, the Commission observed in a footnote that principals of Star and Flower had acquired ownership interests in radio station

<sup>1/</sup> Star's Exception 2 had objected to the Examiner's failure to find that Star would accept a grant conditioned upon Forman's disposing of his radio stations. The Commission denied this as moot, presumably because Forman had already disposed of his stations by the time the Decision was released.

KLIV, San Jose, California, since the closing of the evidentiary record. The Commission stated, however, that "we are not persuaded that such ownership interests should be given any significant weight in this proceeding, in view of KLIV's distance from Rochester and the less than controlling interests held." (Decision, ¶7, fn. 8.) The Commission made no findings as to the ownership interests in KLIV. It was, however, stated at the May 22, 1967, oral argument by Flower's attorney that Harper Sibley, Jr., of Flower, had about a 5% interest. (T. 9959.)

In the Policy Statement, as in numerous other decisions and pronouncements throughout the years, the Commission has professed great interest in encouraging the widest possible diversification of ownership of mass communications media. The Policy Statement makes clear that diversification is the most important of all the comparative criteria. Indeed, in this very case, the Commission preferred Flower to Federal, despite Federal's conceded superiority in integration, simply and solely because of the diversification criterion. Under these circumstances, it was clearly arbitrary for the Commission to disregard the broadcast interests of any principal in any applicant, however small the interest, and however distant the station. The case was, after all, a close one, as the Commission acknowledged; and in a close case small differences may have great decisional importance. The point here, it should be noted, is not whether Sibley's interest should have been regarded as sufficient to require the denial of Flower's application; it is, simply, whether it should have been disregarded altogether.

To ignore it was clearly arbitrary. Sibley, after all, was the dominant figure in Flower (see pages 62-63, supra); he owns 10% of its stock, as much as any other individual holds. (I.D., ¶4.) He was the motivating force behind the formation of Flower (I.D., ¶209); and he was described by Flower's attorney at the oral argument on May 22, 1967, as

the man "responsible" for Flower's creation. (T. 9868.) He is a member of the Sibley family group, which owns 20.83% of Flower's stock. (I.D., ¶6.) Significantly, the Commission did not ignore an adverse factor affecting a stockholder in Heritage who owned a much smaller percentage of that applicant's stock. In fact, Heritage was assigned a serious comparative demerit because of an SEC action affecting someone who owned only 2% of its stock. (Decision, ¶12.) The disparity of treatment was obvious--and obviously arbitrary. The Commission is not free to pick and choose the factors it will consider. It must consider all significant differences. Johnston Broadcasting Co. v. FCC, 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

C. The Commission Failed to Give Fair and Adequate Consideration to the Fulltime Proposal of RTI

The status of RTI--whether or not it should be regarded as an applicant for fulltime operation--was one of the matters discussed at the oral argument on May 22, 1967. RTI's status had been drastically affected when RAETA filed, on October 1, 1965, a request to dismiss its application in exchange for reimbursement of expenses. The contemplated dismissal of the RAETA application left RTI as an applicant proposing less than full use of the facility. RTI sought to remedy its situation by tendering for filing on November 29, 1965, the extended date for filing up-dating amendments in response to the remand order issued the previous May, an amendment specifying fulltime operation and altering its financial and programming proposals accordingly. Acceptance of the RTI amendment was opposed by some of the applicants (including Flower) but not by others.

In the order released April 21, 1966, cancelling the remanded hearing, the Commission directed that all pleadings relating to RTI's proffered amendment be referred to it for decision. (FCC 66-347.) Shortly thereafter, on July 8, 1966, the Commission denied RTI's amendment on the ground

that good cause had not been shown and that RTI should not be permitted to improve its competitive posture during the course of the hearing. (FCC 66-593.)

This is the way matters stood with RTI until the second oral argument was held before the Commission en banc on May 22, 1967. During that proceeding, counsel for RTI asserted that refusal of RTI's amendment had been a denial of procedural due process. (T. 9955.) The Chairman of the Commission then interrogated counsel for the other applicants as to whether RTI's amendment could be accepted without further hearing. This came after counsel for some parties had asserted that further hearings were, in any event, necessary. The answers indicated that there was no consensus on the matter. (T. 9961, 9962-70, 9970-71, 9978, 9982, 9983, 9990, 9992.)

In its Decision released August 3, 1967, the Commission stated that it was granting RTI's request for leave to amend its application. The Commission said:

"After further consideration, we are persuaded that the public interest would be better served by permitting RTI, without altering its comparative qualifications, to bring its proposal up to date so that this proceeding can be decided on the basis of the facts as they now exist. For this reason, we shall grant RTI's request for leave to amend its application to the extent of permitting it to specify fulltime operation."

The decision did not specify what limitations, if any, were imposed on RTI in the comparative evaluation. The phrase "without altering its comparative qualifications" was not explained. In that part of the decision entitled "Evaluation of Comparative Criteria", there was only one reference to RTI and that was in the following sentence, part of the discussion under

"Participation in Station Operation by Owners":

"We recognize that the integration of Flower is not accompanied by past local residence, and that in this respect it is not the equal of RTI, Star, Main and Federal."

In its petition for reconsideration filed after the Decision, RTI urged that the Commission make a comparative evaluation of each of the applicants and either award the channel to it or direct a merger of all applicants. In the order denying petitions for reconsideration, the Commission did not further clarify RTI's status or respond in express terms to its petition.

Under these confusing circumstances, it can hardly be contended that RTI received the full comparative consideration to which an applicant for broadcast facilities is entitled. The Commission's assertion that it would allow RTI's fulltime amendment but would do so "without altering its comparative qualifications" is, quite literally, meaningless. As a share-time applicant, RTI proposed to operate only limited hours, and the other applicants challenged its ability to obtain an affiliation with the ABC network. But as a fulltime applicant RTI proposes to operate approximately the same hours as the other applicants (except for Star's 24-hour proposal), and its ability to obtain an ABC affiliation is unquestioned. Under these circumstances, how could the Commission rationally conclude that it could allow the amendment without altering the applicant's comparative qualifications?

From RTI's point of view, it was the victim of circumstances not of its own making and utterly beyond its power to change. It played no part in the dismissal of RAETA's application, but it was substantially prejudiced by that event. It was even more substantially prejudiced by the Commission's

that in Channel 16 the Commission directed the improper procedure at the outset of the case, whereas here the Commission sanctioned the improper procedure at a later stage of the proceedings. Obviously, this is not a distinction that can logically make Channel 16 inapplicable.

In ¶6 of the order denying petitions for reconsideration, the Commission suggests that appellants waived the defects in the Initial Decision by not making timely objections. The fact of the matter, however, is that the defect had been raised at the earliest possible moment, in the exceptions filed to the Initial Decision on April 27, 1964. Thus, Main's Exception 57 was as follows:

"To the hearing examiner's failure to compare all the applicants in the light of the issues and to her use, instead, of a technique (exemplified in Conclusion 7, to which exception is taken) whereby RAETA (or RAETA-RTI) was first preferred and then used as a norm or standard against which all other applicants were matched on the ground and for the reason that such technique necessarily favors RAETA or (RAETA-RTI) to the prejudice of other applicants."

Federal had also raised much the same point with specific reference to the Examiner's conclusion under the criterion of Integration of Ownership and Management. Its Exception 16 read, in pertinent part, as follows:

"Federal excepts to the conclusion stated in ¶29 [in which the Examiner summed up her conclusions under that criterion] in that no distinction is made by the Examiner with respect to the factor of integration of ownership and management between Federal and Flower, Star, Community, Citizens and Main." 1/

1/ Flower may have been seeking to make the same point with respect to the criterion of Programs in its Exception 158, which asserted that, "The Examiner should have examined the proposals of each of the applicants separately and judged them according to the Commission's classifications and criteria. (See Triad Television Corporation, 25 F.C.C. 848. 1040-1045 (1958).)" Or, Flower's exception may have been directed only to the Examiner's treatment of RAETA and RTI as a single programming entity for purposes of the Programs criterion. In any event, the Commission granted the exception, stating "See paragraph 5 of our Decision herein."

Although the Decision of August 3, 1967, made no reference to the contentions that had been made as to the lack of an Initial Decision, the Appendix to the Decision stated that Main's above-quoted Exception 57 had been "Granted." This was accompanied by the statement, "See paragraph 5 of our Decision herein." That paragraph, however, did not deal with the point of Main's Exception, which was directed to the Examiner's failure to compare all the applicants in the light of the issues." In fact, §5 was not even included in that part of the Decision entitled "Evaluation of Comparative Criteria." 1/

In holding (in effect) that the applicants waived the defects in the Initial Decision, the Commission overlooks the fact that it had itself ordered, on May 15, 1965, a further hearing and a supplemental initial decision. Between that date and the date that the remanded order was cancelled, April 21, 1966, there was certainly no occasion for the parties to demand a further hearing. Nor can a waiver be construed from the pleadings filed in 1967 urging the Commission to decide the case. The parties were, after all, confronted with unprecedented delay in a comparative situation that had changed radically with the dismissal of the RAETA application. Their 1967 pleadings reflect frustration and despair; they do not reflect any intention to waive rights guaranteed by the Administrative Procedure Act and the Communications Act, and they cannot possibly be so interpreted. They were not accompanied by any assertion, expressed or implied, by the parties which had excepted to the deficiencies in the Initial Decision that such exceptions were being withdrawn or abandoned. The Commission was implored to end the long delay and to put the case back on the track towards a final decision. But this did not mean that the parties waived their right to

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1/ The Appendix to the Decision also noted that Federal's Exception 16 had been "Granted to the extent reflected in paragraph 8 of our Decision herein."

an initial or a proposed decision containing meaningful conclusions to which exceptions and briefs could be addressed.

If the Commission construed the requests for "final" action as a waiver, it was certainly disabused of this impression at the oral argument. (T. 9910-15, 9921.)

The defect was actually a jurisdictional one and could not, in any event, have been waived. The Administrative Procedure Act directs that an Examiner "shall" make conclusions on all material issues; it does not say that the Examiner shall do so unless the parties waive the statutorily prescribed procedure. To the contrary, it defines two narrow situations in which the agency may waive the procedure, or depart from it.<sup>1/</sup> But there is no suggestions that the parties may do so. The requirement that an Initial Decision contain conclusions as well as findings is, plainly, a jurisdictional requirement that must be met, regardless of anything that the parties say or do.

The requirement that the Examiner make conclusions on all issues is inextricably bound up with the parties' right to file exceptions. The right to file exceptions to a Hearing Examiner's initial decision (or a recommended decision by the agency) is absolute. (5 U.S.C. §557.) But a party cannot file exceptions to a document that does not deal with the issues. And the Initial Decision in this case did not deal with the issues in a way that permitted the preparation and filing of meaningful exceptions. This became critically significant with the dismissal of RAETA, the standard against which all other applicants had been measured.

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<sup>1/</sup> The exception because of an Examiner's unavailability does not refer to a situation where the Examiner retires after an Initial Decision has been released. Such an event could not confer post hoc validity on an Initial Decision that was invalid at the time it was rendered. Where a further hearing is required under such circumstances, the Commission can assign the case to another Examiner for a supplemental initial decision. Indeed, this was what the Commission directed in its remand order of May 13, 1965. (FCC 65-403.)

Even if the Initial Decision were valid when rendered, the Examiner's failure to make conclusions as to the comparative qualifications of the other applicants necessarily meant that it was no longer valid after RAETA withdrew. That occurrence rendered all her conclusions moot. <sup>1/</sup> This, the Commission has squarely admitted. <sup>2/</sup> Under such circumstances, the Communications Act (47 U.S.C. §409(b)), the Administrative Procedure Act (5 U.S.C. §557), and this court's decision in Channel 16, required a supplemental initial decision by a Hearing Examiner or a recommended decision by the Commission before issuance of a final decision.

The fact that further proceedings are necessary under the unique circumstances of this case does not mean that there will hereafter be a wholesale reopening of records and a succession of initial decisions in other cases. First, the situation presented here, in which an applicant that has been favored in an initial decision thereafter withdraws completely (as distinguished from a merger) was unprecedeted and, obviously, is not likely to recur. Second, the instant situation is most unusual also in that the Examiner in this case failed to make any ranking of the applicants or to make any conclusions comparing the unsuccessful applicants among themselves. Had she done so, there might still be meaningful conclusions to which meaningful exceptions could be addressed.

Indeed, any suggestion that delay, obstruction or handicapping of administrative process would result from the position urged by appellants would be wholly tenuous, if not frivolous, in the circumstances of the instant case. For, if the Commission, when it decided on May of 1965--months

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<sup>1/</sup> Her factual premise is also no longer correct. At the time she wrote, there was no educational station in Rochester. But RAETA is now operating such a station on a fulltime basis. (Decision, ¶2.)

<sup>2/</sup> "Although the Examiner proposed to grant the share-time proposal of RAETA and RTI, RAETA has withdrawn its application, and it is apparent that the findings in this proceeding now warrant substantially different conclusions and a different ultimate result." (Decision, ¶5.)

after the first oral argument--to remand the case for further hearing and supplemental initial decision, (a) had acted on the exceptions to the defects in the Initial Decision and expressly directed that the supplemental initial decision contain conclusions comparing and ranking all the applicants on all material comparative criteria; and (b) had not later revoked such a remand order, it is almost indisputable that the ultimate resolution of this case would have been speeded by many months, if not years.

This course became impelling after the RAETA withdrawal. But no applicant could reasonably have been expected to point the Commission's way to this course since the applicants reasonably expected that a supplemental initial decision would necessarily contain the requisite but previously omitted comparative conclusions. Nor could they reasonably have been expected to do so when the Commission suddenly revoked its remand order since it did so on its own initiative and without any intimation of the future procedure it would follow. Nor did the Commission invite any pleadings as to the future procedure at any time thereafter. It was not until many months later that the Commission--prompted by the applicants' urgings for the end of delays--ordered a further oral argument on the basis of exceptions to an initial decision which by that time had been stripped of all conclusions.<sup>1/</sup> Nevertheless, the exceptions to the lack of conclusions in the Examiner's Initial Decision were still before the agency, and had become even more impelling in view of RAETA's withdrawal. They were pressed vigorously at the second oral argument, and they were renewed in timely filed petitions for reconsideration.

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<sup>1/</sup> Moreover, the dismissal of the RAETA application deprived the Initial Decision of an essential attribute that a statutorily sufficient initial decision must possess. An initial decision must be one that is susceptible of becoming final agency action if no appeal is taken or objection entered. (5 U.S.C. §557(b).) Following the RAETA dismissal, the Initial Decision in this case was, indisputably, no longer one that could have become final, with or without appeals or objections.

Appellants submit; therefore, that there was no valid Initial Decision in this case, and that this deprived them of important rights. The Examiner's failure to apply the comparative criteria to all of the applicants was a failure to make the conclusions called for by the issues and required by law. With the later dismissal of RAETA's application, the Initial Decision became meaningless, in both its premise and its result. Its conclusions were rendered moot. As a result, the parties have been deprived of any meaningful opportunity to file exceptions. In fact, they have also been deprived of the right to have a Hearing Examiner consider their proposed findings of fact and conclusions, since the proposed findings and conclusions that they submitted in April 1964 were addressed to a factual situation that no longer exists. These fundamental defects can be cured only by further proceedings before an Examiner who will consider new proposed findings and conclusions and issue a valid initial decision, applying the comparative criteria to all applicants and making the conclusions called for by the issues. Only then can exceptions be filed by the applicants and a lawful decision be rendered by the Commission.

#### CONCLUSION

For the reasons stated, the grant to Intervenor should be set aside and the case remanded to the Commission for further proceedings in compliance with 5 U.S.C. §557 and Section 409(a) and (b) of the Communications Act of 1934, as amended (47 U.S.C. §409(a) and (b).) The Court should direct the Commission to comply with all procedural requirements, resolve

all issues and contentions, make appropriate findings and conclusions, and explain its reasoning and the bases for its actions. The court should also grant such other or further relief, or direct such other or further action by the Commission, as may be necessary or appropriate.

Respectfully submitted,

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APPENDIX

- A. 5 U.S.C. §557 (formerly Section 8, Administrative Procedure Act)
- B. 47 U.S.C. §409(a) and (b) (Communications Act of 1934, as amended, Section 409(a) and (b))
- C. Policy Statement on Comparative Broadcast Hearings  
(FCC 65-689), 1 F.C.C. 2d 393, 5 R.R. 2d 1901  
(1965)

(1)

A.

5 U.S.C. §557 (formerly Section 8, Administrative Procedure Act)

... §557 Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record. - (a) This Section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with Section 556 of this Title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to Section 554(d) of this Title, an employee qualified to preside at hearings pursuant to Section 556 of this Title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to Section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses -

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions

imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions -

- (1) proposed findings and conclusions; or
- (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
- (3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of -

- (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
- (B) the appropriate rule, order, sanction, relief, or denial thereof.

B.

47 U.S.C. §409(a) and (b) (Communications Act of 1934, as amended,  
Section 409(a) and (b))

Section 409. - (a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons become unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

(b) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the function of passing upon the exceptions is delegated under Section 5(d)(1): Provided, however, that such authority shall not be the same authority which made the decision to which the exception is taken.

C.

Policy Statement on Comparative Broadcast Hearings (F.C.C. 65-689),  
1 F.C.C. 2d 393, 5 R.R. 2d 1901 (July 28, 1965)

By the Commission:(Commissioners Hyde and Bartley dissenting and issuing statements; Commissioner Lee concurring and issuing a statement)

One of the Commission's primary responsibilities is to choose among qualified new applicants for the same broadcast facilities.<sup>1/</sup> This commonly requires extended hearings into a number of areas of comparison. The hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable.

Furthermore, membership on the Commission is not static and the views of individual Commissioners on the importance of particular factors may change. For these and other reasons, the Commission is not bound to deal with all cases at all times as it has dealt in the past with some that seem comparable, Federal Communications Commission v. WOKO, Inc., 329 US 223, 228,<sup>2/</sup>and changes of viewpoint, if reasonable, are recognized as both inescapable and proper. Pinellas Broadcasting Co. v. Federal Communications Commission, 97 US App DC 236, 230 F2d 204 [13 RR 2058], cert. den. 350 US 1007.

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- 1/ This statement of policy does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license.
- 2/ "[T]he doctrine of stare decisis is not generally applicable to the decisions of administrative tribunals," Kentucky Broadcasting Corp. v. Federal Communications Commission, 84 US App DC 383, 385, 174 F2d 38, 40 [4 RR 2126].

All this being so, it is nonetheless important to have a high degree of consistency of decision and of clarity in our basic policies. It is also obviously of great importance to prevent undue delay in the disposition of comparative hearing cases. A general review of the criteria governing the disposition of comparative broadcast hearings will, we believe, be useful to parties appearing before the Commission. It should also be of value to the Examiners who initially decide the cases and to the Review Board to which the basic review of Examiners' decisions in this area has been delegated. See §0. 365 of our Rules, 47 CFR §0. 365. <sup>3/</sup>

This statement is issued to serve the purpose of clarity and consistency of decision, and the further purpose of eliminating from the hearing process time-consuming elements not substantially related to the public interest. We recognize, of course, that a general statement cannot dispose of all problems or decide cases in advance. Thus, for example, a case where a party proposes a specialized service will have to be given somewhat different consideration. Difficult cases will remain difficult. Our purpose is to promote stability of judgment without foreclosing the right of every applicant to a full hearing.

We believe that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications. The value of these objectives is clear. Diversification of control is a public good in a free society, and is additionally desirable where a government licensing system limits access

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3/ On June 16, 1964 the rule was amended to give the Review Board authority to review Initial Decisions of Hearing Examiners in comparative television cases, a function formerly performed only by the Commission itself.

by the public to the use of radio and television facilities.<sup>4/</sup> Equally basic is a broadcast service which meets the needs of the public in the area to be served, both in terms of those general interests which all areas have in common and those special interests which areas do not share. An important element of such a service is the flexibility to change as local needs and interests change. Since independence and individuality of approach are elements of rendering good program service, the primary goals of good service and diversification of control are also fully compatible.

Several factors are significant in the two areas of comparison mentioned above, and it is important to make clear the manner in which each will be treated.

1. Diversification of control of the media of mass communications.

Diversification is a factor of primary significance since, as set forth above, it constitutes a primary objective in the licensing scheme.

As in the past, we will consider both common control and less than controlling interests in other broadcast stations and other media of mass communications. The less the degree of interest in other stations or media, the less will be the significance of the factor. Other interests in the principal community proposed to be served will normally be of most significance,

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4/ As the Supreme Court has stated, the First Amendment to the Constitution of the United States "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," Associated Press v. United States, 326 US 1, 20. That radio and television broadcast stations play an important role in providing news and opinions is obvious. That it is important in a free society to prevent a concentration of control of the sources of news and opinion and, particularly, that government should not create such a concentration, is equally apparent, and well established. United States v. Storer Broadcasting Co., 351 US 192 [13 RR 2161]; Scripps-Howard Radio, Inc. v. Federal Communications Commission, 89 US App DC 13, 189 F2d 677 [7 RR 2001], cert. den. 342 US 830.

followed by other interests in the remainder of the proposed service area<sup>5/</sup> and, finally, generally in the United States. However, control of large interests elsewhere in the same state or region may well be more significant than control of a small medium of expression (such as a weekly newspaper) in the same community. The number of other mass communication outlets of the same type in the community proposed to be served will also affect to some extent the importance of this factor in the general comparative scale.

It is not possible, of course, to spell out in advance the relationships between any significant number of the various factual situations which may be presented in actual hearings. It is possible, however, to set forth the elements which we believe significant. Without indicating any order of priority, we will consider interests in existing media of mass communications to be more significant in the degree that they:

- (A) are larger, i.e., go towards complete ownership and control; and to the degree that the existing media:
- (B) are in, or close to, the community being applied for;
- (C) are significant in terms of numbers and size, i.e., the area covered, circulation, size of audience, etc.;
- (D) are significant in terms of regional or national coverage; and
- (E) are significant with respect to other media in their respective localities.

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<sup>5/</sup> Sections 73.35(a), 73.240(a)(1) and 73.636(a)(1) of our rules, 47 CFR §§73.35(a), 73.240(a)(1), 73.636(a)(1), prohibit common control of stations in the same service (AM, FM and TV) within prescribed overlap areas. Less than controlling ownership interests and significant managerial positions in stations and other media within and without such areas will be considered when held by persons with any ownership or significant managerial interest in an applicant.

2. Full-time participation in station operation by owners. We consider this factor to be of substantial importance. It is inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station. This factor is thus important in securing the best practicable service.<sup>6/</sup> It also frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership.

We are primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit given will drop sharply, and no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis. In assessing proposals, we will also look to the positions which the participating owners will occupy, in order to determine the extent of their policy functions and the likelihood of their playing important roles in management. We will accord particular weight to staff positions held by the owners, such as general manager, station manager, program director, business manager, director of news, sports or public service broadcasting, and sales manager. Thus, although positions of less responsibility will be considered, especially if there will be full-time integration by those holding those positions, they cannot be given the decisional significance attributed to the integration of stockholders exercising policy functions. Merely consultative positions will be given no weight.

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<sup>6/</sup> As with other proposals, it is important that integration proposals be adhered to on a permanent basis. See Tidewater Telcradio, Inc., 24 Pike & Fischer RR 653.

Attributes of participating owners, such as their experience and local residence, will also be considered in weighing integration of ownership and management. While, for the reasons given above, integration of ownership and management is important per se, its value is increased if the participating owners are local residents and if they have experience in the field. Participation in station affairs on the basis described above by a local resident indicates a likelihood of continuing knowledge of changing local interests and needs.<sup>7/</sup> Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management.

Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the community. Mere diversity of business interests will not be considered. Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area. Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight than present residence of several years' duration.

Previous broadcasting experience includes activity which would not qualify as a past broadcast record, i.e., where there was not ownership responsibility for a station's performance. Since emphasis upon this element could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage,<sup>8/</sup> it will be deemed of minor

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7/ Of course, full-time participation is also necessarily accompanied by residence in the area.

8/ Lack of experience, unlike a high concentration of control, is remediable. See Sunbeam Television Corp. v. Federal Communications Commission, 100 US App DC 82, 243 F2d 26 [15 RR 2001].

significance. It may be examined qualitatively, upon an offer of proof of particularly poor or good previous accomplishment.

The discussion above has assumed full-time, or almost full-time participation in station operation by those with ownership interests. We recognize that station ownership by those who are local residents and, to a markedly lesser degree, by those who have broadcasting experience, may still be of some value even where there is not the substantial participation to which we will accord weight under this heading. Thus, local residence complements the statutory scheme and Commission allocation policy of licensing a large number of stations throughout the country, in order to provide for attention to local interests, and local ownership also generally accords with the goal of diversifying control of broadcast stations. Therefore, a slight credit will be given for the local residence of those persons with ownership interests who cannot be considered as actively participating in station affairs on a substantially full-time basis but who will devote some time to station affairs, and a very slight credit will similarly be given for experience not accompanied by full-time participation. Both of these factors, it should be emphasized, are of minor significance. No credit will be given either the local residence or experience of any person who will not put his knowledge of the community (or area) or experience to any use in the operation of the station.

3. Proposed program service. The United States Court of Appeals for the District of Columbia Circuit has stated that, "in a comparative consideration, it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service." Johnston Broadcasting Co. v. Federal Communications Commission, 85 US App DC 40, 48, 175 F2d 351, 359 [4 RR 2138]. The importance of program service is obvious. The feasibility of making a comparative evaluation is not so obvious.

Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance.

The basic elements of an adequate service have been set forth in our July 27, 1960 "Report and Statement of Policy Re: Commission en banc Programming Inquiry," 25 FR 7291, 20 Pike & Fischer RR 1901, and need not be repeated here.<sup>9/</sup> And the applicant has the responsibility for a reasonable knowledge of the community and area, based on surveys or background, which will show that the program proposals are designed to meet the needs and interests of the public in that area. See *Henry v. Federal Communications Commission*, 112 US App DC 257, 302 F2d 191 [23 RR 2016], cert. den. 371 US 821. Contacts with local civic and other groups and individuals are also an important means of formulating proposals to meet an area's needs and interests. Failure to make them will be considered a serious deficiency, whether or not the applicant is familiar with the area.

Decisional significance will be accorded only to material and substantial differences between applicants' proposed program plans. See *Johnston Broadcasting Co. v. Federal Communications Commission*, 85 US App DC 40, 175 F2d 351. Minor differences in the proportions of time allocated to different types of programs will not be considered. Substantial differences will be considered to the extent that they go beyond ordinary differences in

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<sup>9/</sup> Specialized proposals necessarily have to be considered on a case-to-case basis. We will examine the need for the specialized service as against the need for a general-service station where the question is presented by competing applicants.

judgment and show a superior devotion to public service. For example, an unusual attention to local community matters for which there is a demonstrated need may still be urged. We will not assume, however, that an unusually high percentage of time to be devoted to local or other particular types of programs is necessarily to be preferred. Staffing plans and other elements of planning will not be compared in the hearing process except where an inability to carry out proposals is indicated. 10/

In light of the considerations set forth above, and our experience with the similarity of the program plans of competing applicants, taken with the desirability of keeping hearing records free of immaterial clutter, no comparative issue will ordinarily be designated on program plans and policies, or on staffing plans or other program planning elements, and evidence on these matters will not be taken under the standard issues. The Commission will designate an issue where examination of the applications and other information before it makes such action appropriate, and applicants who believe they can demonstrate significant differences upon which the reception of evidence will be useful may petition to amend the issues.

No independent factor of likelihood of effectuation of proposals will be utilized. The Commission expects every licensee to carry out its proposals, subject to factors beyond its control, and subject to reasonable judgment that the public's needs and interests require a departure from original plans. If there is a substantial indication that any party will not be able to carry out its proposals to a significant degree, the proposals themselves

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10/ We will similarly not give independent consideration to proposed studios or other equipment. These are also elements of a proposed operation which are necessary to carry out the program plans, and which are expected to be adequate. They will be inquired into only upon a petition to amend the issues which indicates a serious deficiency.

will be considered deficient. 11/

4. Past broadcast record. This factor includes past ownership interest and significant participation in a broadcast station by one with an ownership interest in the applicant. It is a factor of substantial importance upon the terms set forth below.

A past record within the bounds of average performance will be disregarded, since average future performance is expected. Thus, we are not interested in the fact of past ownership per se, and will not give a preference because one applicant has owned stations in the past and another has not.

We are interested in records which, because either unusually good or unusually poor, give some indication of unusual performance in the future. Thus, we shall consider past records to determine whether the record shows (i) unusual attention to the public's needs and interests, such as special sensitivity to an area's changing needs through flexibility of local programs designed to meet those needs, or (ii) either a failure to meet the public's needs and interests or a significant failure to carry out representations made to the Commission (the fact that such representations have been carried out, however, does not lead to an affirmative preference for the applicant, since it is expected, as a matter of course, that a licensee will carry out representations made to the Commission).

If a past record warrants consideration, the particular reasons, if any, which may have accounted for that record will be examined to determine whether they will be present in the proposed operation. For example, an extraordinary record compiled while the owner fully participated in operation

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11/ It should be noted here that the absence of an issue on program plans and policies will not preclude cross-examination of the parties with respect to their proposals for participation in station operation, i.e., to test the validity of integration proposals.

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of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying.

5. Efficient use of frequency.<sup>12/</sup> In comparative cases where one of two or more competing applicants proposes an operation which, for one or more engineering reasons, would be more efficient, this fact can and should be considered in determining which of the applicants should be preferred. The nature of an efficient operation may depend upon the nature of the facilities applied for, i.e., whether they are in the television or FM bands where geographical allocations have been made, or in the standard broadcast (AM) band where there are no such fixed allocations. In addition, the possible variations of situations in comparative hearings are numerous. Therefore, it is not feasible here to delineate the outlines of this element, and we merely take this occasion to point out that the element will be considered where the facts warrant.

6. Character. The Communications Act makes character a relevant consideration in the issuance of a license. See Section 308(b), 47 USC §308(b). Significant character deficiencies may warrant disqualification, and an issue will be designated where appropriate. Since substantial demerits may be appropriate in some cases where disqualification is not warranted, petitions to add an issue on conduct relating to character will be entertained. In the absence of a designated issue, character evidence will not be taken. Our intention here is not only to avoid unduly prolonging the hearing process, but also to avoid those situations where an applicant

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<sup>12/</sup> This factor as discussed here is not to be confused with the determination to be made of which of two communities has the greater need for a new station. See *Federal Communications Commission v. Allentown Broadcasting Corp.*, 349 US 358 [12 RR 2019].

converts the hearing into a search for his opponents' minor blemishes, no matter how remote in the past or how insignificant.

7. Other factors. As we stated at the outset, our interest in the consistency and clarity of decision and in expedition of the hearing process is not intended to preclude the full examination of any relevant and substantial factor. We will thus favorably consider petitions to add issues when, but only when, they demonstrate that significant evidence will be adduced. 13/

We pointed out at the outset that in the normal course there may be changes in the views of individual Commissioners as membership on the Commission changes or as Commissioners may come to view matters differently with the passage of time. Therefore, it may be well to emphasize that by this attempt to clarify our present policy and our views with respect to the various factors which are considered in comparative hearings, we do not intend to stultify the continuing process of reviewing our judgment on these matters. Where changes in policy are deemed appropriate they will be made, either in individual cases or in further general statements, with an explanation of the reason for the change. In this way, we hope to preserve the advantages of clear policy enunciation without sacrificing necessary flexibility and openmindedness.

Cases to be decided by either the Review Board or, where the Review Board has not been delegated that function, by the Commission itself, will be decided under the policies here set forth. So too, future designations for hearing will be made in accordance with this statement. Where cases are

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13/ Where a narrow question is raised, for example on one aspect of financial qualification, a narrowly drawn issue will be appropriate. In other circumstances, a broader inquiry may be required. This is a matter for ad hoc determination.

now in hearing, the Hearing Examiner will be expected to follow this statement to the extent practicable. Issues already designated will not be changed, but evidence should be adduced only in accordance with this statement. Thus, evidence on issues which we have said will no longer be designated in the absence of a petition to add an issue, should not be accepted unless the party wishing to adduce the evidence makes an offer of proof to the Examiner which demonstrates that the evidence will be of substantial value under the criteria discussed herein. Since we are not adopting new criteria which would call for the introduction of new evidence, but rather restricting the scope somewhat of existing factors and explaining their importance more clearly, there will be no element of surprise which might affect the fairness of a hearing. It is, of course, traditional judicial practice to decide cases in accordance with principles in effect at the time of decision. Administrative finality is also important. Therefore, cases which have already been decided, either by the Commission or, where appropriate, by the Review Board, will not be reconsidered. We believe that our purpose to improve the hearing and decisional process in the future does not require upsetting decisions already made, particularly in light of the basically clarifying nature of this document.

#### DISSENTING STATEMENT OF COMMISSIONER HYDE

I dissent to the adoption of the "Policy Statement on Comparative Broadcast Hearings" issued July 28, 1965.

One of the expressed objectives of the Policy Statement is the simplification and the expedition of the Commission's processes with respect to decisions in comparative cases. I agree with the majority that this is a most desirable objective; however, the Policy Statement as now framed will not achieve expedition. Moreover, to the extent that a degree of simplification of our

decisional process may result from its adoption, this result, in my opinion, would be at a price which would be prohibitive and perhaps unlawful. It would press applicants into a mold in order to meet the Commission's preconceived standards, thus deterring perhaps better-qualified applicants from applying; it would preclude significant consideration of material differences among applicants and result in automatic preference of applicants slavishly conforming to the mold, and eventually force the Commission to decide cases on trivial differences among applicants since basically they would all have come out of the same press. I consider this much too high a price to pay to achieve the majority's objective.

I think the initiative in proposing how stations should be owned and operated should remain with the applicants, thus providing opportunities for diversified approaches. Moreover, in the interest of diversity, the initiative for the presentation of program plans should be left with applicants and without under circumscription as to what should be included or excluded. Then, as a matter of elementary fairness, as well as due process, applicants should be entitled to examination and comparison on the merit of their respective proposals - not merely comparison with previously-adopted positions. It may be that the check-off approach (as argued in the Policy Statement) will be helpful to Examiners and others in making decisions, but even this illusion of facility is certain to disappear as to cases involving competing new applicants who can plan to conform to prescribed formulas.

When competing applications for facilities are filed, the Commission must make an election which involves a comparison of characteristics. As was stated in *Johnston Broadcasting Company v. FCC*, USCA, DC, May 4, 1949:

"The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. Neither can it base its conclusion upon a selection from among its findings of differences and ignore all other findings. It must take into account all the characteristics which indicate differences, and reach an overall relative determination upon an evaluation of all factors, conflicting in many cases. . ."

In this situation, and in order to comply with the directive of the court, the Commission must consider among other things differences in makeup of applicants and differences in program proposals for the purpose of making the required comparison. But this requirement to consider differences in characteristics does not warrant the Commission to presume to establish - in the abstract - standardized preferences as to how applicants should be organized or as to how programs should be planned. I think that the effort to direct and standardize is incongruous with the basic policy of the Act.

I presume that one of the reasons for the adoption of the Policy Statement is to apprise potential applicants of the views of the Commission (and individual Commissioners) as to the manner in which differences among applicants will be treated. Decisions which have been made are available for this purpose. The views of the Commission and of individual Commissioners as to the effect of differences among applicants in comparative cases are set out in decisions which touch on such differences. Similarly, the specific views of dissenting or of separately-concurring Commissioners are available for analysis.

I know of no two cases where the underlying facts are identical. I know of no two cases where differences among the applicants are identical. Therefore, the significance to be given in each decision to each difference and to each criterion must of necessity vary, and must necessarily be considered in context with the other facts of the individual cases.

If the Commission has been remiss in the past in not spelling out the decisional process in each case as carefully as it should, the obvious remedy is improvement in the preparation of Decisions. Moreover, through more carefully written Decisions, both the Commission and the applicants can view the weight given to each difference and to each criterion in light of all of the facts in a given case. To the extent the other relevant facts in the applicant's case require the same conclusion, an applicant can assume such conclusion will be reached by the Commission. To the extent the other relevant facts require or permit a different conclusion, the Commission will be free to so conclude. However, to attempt to cure what might be considered past omissions in not fully spelling out reasons for Decisions by prescribing an arbitrary order and weight to be given to each of such criteria seems to me to be idealizing form over substance, and avoiding statutory and legal requirements in doing so. This is especially true when no need exists for establishing this procedure since a simpler and more adequate solution is at hand.

The proposed fiat as to the weight which will be given to the various criteria - without sound predication of accepted data and when considered only in a vacuum and in the abstract - must necessarily result in a degree of unfairness to some applicants and in the fashioning of an unnecessary strait jacket for the Commission in its decisional process. How can we decide in advance and in a vacuum that a specific broadcaster with a satisfactory record in one community will be less likely to serve the broadcasting needs of a second community than a specific long-time resident of that second community who doesn't have broadcast experience? How can we make this decision without knowing more about each applicant? The majority now says that experience can always be acquired and, therefore, that it is less important than local residence. But the knowledge acquired from such local residence can by the

same token by obtained just as easily - if not more easily - than broadcast experience. It seems clear to me that the importance to be given to the element of experience in one case or to the element of local residence in another case will necessarily vary in light of the additional factors involved in each case.

Moreover, the decision by an individual without broadcast experience (or perhaps even without business experience) to take full control of a complicated broadcast venture is held by this proposed Policy to be entitled to a significantly greater preference than a decision by a more prudent applicant who intends to secure competent, experienced and professional management to operate a station under his general direction until he acquires a reasonable degree of experience. It may be reasonable for the Commission to make such a conclusion in the light of all of the facts in a particular case, taking into consideration the specific attributes of the individual concerned, but it is obvious that the same conclusion need not be valid in a second case where the same attributes may not be present. The fact that it may be difficult to explain different decisions in the two cases is taken by the majority as sufficient reason to establish arbitrary preferences. This I cannot accept.

The evaluation of local needs and how best to provide for them is a highly subjective matter. Is the Commission competent - in advance of a review of all of the pertinent factors in a particular case - to decide that non-professional opinion as to the existence of needs or as to the manner in which the needs can best be fulfilled is automatically entitled to a greater weight than professional opinion based upon prior experience in substantially identical communities? I submit that it is not, and that although the decision might be difficult to make in any one case, and perhaps even more difficult to explain where the decisions differ on this factor in two cases, there can

nevertheless be sound bases for different results in cases involving these elements. We should not be foreclosed from exploring them.

The language of the Policy Statement is quite broad in certain areas while, at the same time, the statement tries to be precise and restrictive in its proposed results. For example, terms such as "unusually high percentage of time", "unusual attention to community matters", "minor differences in the proportion of time", "ordinary differences in judgment", etc., are used without definition as to the meaning of the terms. I presume that future decisions will spell out at least some guidelines as to their meaning, but it is obvious that this will be achieved only at great cost to the applicants and after much litigation and then only in connection with the facts of a particular case. Since precise definitions are really not now feasible, why should these terms be employed? And since there appear to be no presently-existing guidelines which can be established in this document, then the ensuing wrangle in comparative cases as to what is ordinary, usual, unusual, high, etc., will take up at least the same time, if not more, than the mere introduction of proof of the basic facts.

I do not believe that the Commission has given sufficient thought to the consequences of establishing the order and weight of preferences in comparative hearing cases. The document says that the policy is to apply to "new" applicants, and that it "does not attempt to deal with the somewhat different problems raised where an applicant is contesting with a licensee seeking renewal of license". I do not believe that a logical or a legal basis can be established for making a distinction between criteria to be applied to renewal applications and criteria applicable to initial applications. The statutory test is exactly the same. The intention of Congress to require the same test was affirmed in the Communications Act Amendments of 1952. Since we must assume that the Commission will find it appropriate or necessary to make

uniform application of its statement of preferences, it is essential to consider the consequences of such application. The filing of a new application - organized according to formula - to challenge a renewal applicant could lead to a facile but in many instances unfair and arbitrary decisional process. Is the Commission now ready to read out established broadcasters, not locally owned, but otherwise without blemish in favor of any locally-owned applicants? Is the Commission now ready to read out established broadcasters who are without blemish, except that they utilize competent personnel who do not have an ownership interest, in favor of applicants who propose to operate the facilities personally? Is the Commission ready to accept a new applicant formed to meet this preconceived mold in preference to an existing broadcaster who does not fit into such mold regardless of other circumstances?

I must assume that in the above cases the Commission will not reach its judgments arbitrarily and without giving consideration to all of the significant elements. Upon this assumption, I can foresee the development of case after case where exceptions to the Policy will be found to be necessary in order to reach a decision which a majority will consider to be fair and in the public interest. I can foresee a decisional process which eventually will be substantially similar - if not virtually identical - to the one in existence. Under these circumstances, I cannot believe that the public interest will be served, or the processes of the Commission expedited, by the adoption of the proposed Policy Statement.

No useful purpose would appear to be served by further belaboring these points. While the motives of the majority may be excellent, I do not believe that its objectives can thus be achieved. Moreover, I fear that the degree of uniformity which is being sought will necessarily be detrimental to broadcasting in general and to the public interest.

An overall objection which I think I should state is that the Commission is, in effect, placing legislative-like restrictions upon performance under the responsibility Congress intended it to implement with broad discretion. It would appear that we do not trust Commissioners to exercise judgment with as much discretion as Congress intended to repose in the Agency. This restrictive approach not only limits the Agency, but, as has been indicated, threatens to inhibit the development of services which do not conform to preconceived molds.

I think that the Commission should consider - instead of the adoption of this proposed "Policy Statement" - the introduction of such modern and accepted procedural methods as "discovery" - requiring its staff to make a more careful examination of each competing applicant prior to the issuance of hearing orders so as to specify issues which will encompass all material differences among the applicants rather than ordering hearings on generalized, boiler-plate issues and preconceived conclusions; and writing its decisions with such care as to eliminate frivolous and inconsequential matter and in such a manner that applicants would be readily apprised of areas which the Commission considers to be vitally important. I believe that discovery procedure alone will do more to bring light - and to minimize heat - in comparative cases than a general abjuration of trivia. If the parties and, in fact, the Commission can secure factual information about each of the applicants before the hearing, and if therafter, the Commission will exercise care and discretion in the framing of the issues, more will have been achieved to shorten our hearing procedures than can reasonably be expected from the adoption of this Policy Statement.

## DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I believe that our comparative hearings should be expedited by eliminating what has amounted to extensive bickering in the record over minutiae.

As I see it, however, the Commission majority is attempting the impossible here when it prejudges the decisional factors in future cases. My observation is that there are no two cases exactly alike. There are so many varying circumstances in each case that a factor in one may be more important than the same factor in another. Broadcasting - a dynamic force in our society - experiences constant change. I have expressed it differently on occasions by saying, "There's nothing static in radio but the noise." If we are to encourage the larger and more effective use of radio in the public interest, we must avoid becoming static ourselves.

## CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

Even though I recognize the Policy Statement adopted by the Commission to be the result of a sincere effort to clarify the historical process of selecting a winner in comparative broadcast hearings, I am concurring with considerable reluctance. I am disappointed that the Commission did not examine alternative methods of "picking a winner" from a group of competing applicants, each of which may be fully qualified but only one of which may be granted. For example, in a recent case involving nine applications where I unqualifiedly concurred with the result arrived at by the majority, I said:

"However, I would much prefer such appropriate changes in the Communications Act and in the Commission's practices and policies as would have permitted, in a case such as this, adoption of a procedure which would, on a comparative basis, eliminate from further consideration several of the applications, and which would have permitted us to direct the remaining applicants to endeavor to work out a satisfactory merger arrangement within a stated reasonable period. In the event that such a merger were thereafter presented to the Commission, an award could have been given to the merged entity. Failing such a merger, the Commission would thereupon proceed to select a winner from among the limited eligibles." Veterans Broadcasting Company, Inc., et al, decided January 19, 1965 [4 RR 2d 375].

Over the years I have participated in Decisions in hundreds of "comparative proceedings" and candor compels me to say that our method of selection of the winning applicant has given me grave concern. I realize, of course, that where we have a number of qualified applicants in a consolidated proceeding for a single facility in a given community, it is necessary that we grant one and deny the others. The ultimate choice of the winner generally sustains the Commission's choice despite the recent rash of remands from the court. Thus, it would appear that we generally grant the "right" application. However, I am not so naive as to believe that granting the "right application" could not, in some cases, be one of several applications.

The criteria that the Commission now says will be decisive - assuming all other things are substantially equal - in choosing among qualified applicants for new broadcast facilities in comparative hearings, are not new. However, the Policy Statement does tend to restrict the scope somewhat of existing factors and if undue delay in the disposition of comparative broadcast hearings is thus prevented, some good will have been accomplished.

I wish to make clear that my concurrence here does not bind me with respect to the weight I might see fit to put upon the various criteria in a given case. For example, while I recognize the problem of diversification of the mass media, I also recognize some counterbalancing in the advantages of common ownership of a radio station and a CATV system in the same market. In other words, if it should appear to me in a given proceeding that the owner of a newspaper or of a CATV system would do the better job of serving a particular community, I would not be so concerned with the composition of such an applicant that I would select another that was not "tainted" with the media of mass communication.

Historically, a prospective applicant hires a highly skilled communications attorney, well versed in the procedures of the Commission. This counsel has a long history of Commission Decisions to guide him and he puts together an application that meets all of the so-called criteria. There then follows a torturous and expensive hearing wherein each applicant attempts to tear down his adversaries on every conceivable front, while individually presenting that which he thinks the Commission would like to hear. The Examiner then makes a reasoned decision which, at first blush, generally makes a lot of sense - but comes the Oral Argument and all of the losers concentrate their fire on the "potential" winner and the Commission must thereupon examine the claims and counter claims, "weigh" the criteria and pick the winner which, if my recollection serves me correctly, is a different winner in about 50 per cent of the cases.

The real blow, however, comes later when the applicant that emerged as the winner on the basis of our "decisive" criteria sells the station to a multiple owner or someone else that could not possibly have prevailed over other qualified applicants under the criteria in an adversary proceeding. It may be that there is no better selection system than the one being followed. If so, it seems like a "hellva way to run a railroad", and I hope these few comments may inspire the Commission to find that better system even if it requires changes in the Communications Act.

UNITED STATES COURT OF APPEALS  
For the District of Columbia Circuit

No. 21,277, 21,541-47

STAR TELEVISION, INC. (No. 21,277); COMMUNITY BROADCASTING, INC. (No. 21,541); CITIZENS TELEVISION CORP. (No. 21,542); THE FEDERAL BROADCASTING SYSTEM, INC. (No. 21,543); HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC. (No. 21,544); GENESSEE VALLEY TELEVISION CO., INC. (No. 21,545); MAIN BROADCAST CO., INC. (No. 21,546); ROCHESTER TELECASTERS, INC. (No. 21,547),

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,

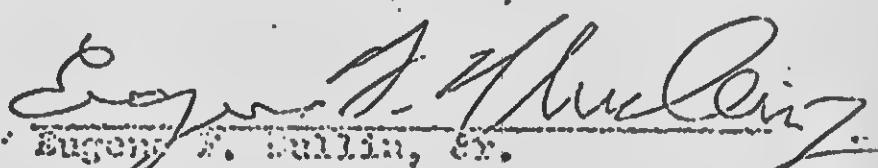
FLOWER CITY TELEVISION CORPORATION,

Appellee,

Intervenor.

CERTIFICATE OF SERVICE

I certify that I have, this 18th day of March, 1968, caused a copy of the consolidated Brief for Appellants, and of this certificate, to be delivered to the General Counsel, Federal Communications Commission, Room 614, 1919 N Street, N.W., Washington, D.C., and to Harold David Cohen, Esquire (Pierson, Ball & Dowd), Ring Building, 19th and K Streets, N.W., Washington, D.C. In accordance with the court's order of February 19, 1968, the required number of copies of the final brief in mimeograph, xerox (or xerox type reproduction) or printed form will be filed with the Clerk on or before April 15, 1968. No changes will be made in the final brief except for minor changes or corrections.

  
Eugene J. Mullin, Esq.  
Attorney for Appellant Radio Broadcast Co., Inc. (No. 21,545)

refusal to permit it to amend promptly to put itself on a par with the other applicants. As late as the oral argument of May 22, 1967, the Commission was still treating RTI as an applicant proposing only part-time use of the channel. There is no indication in the Decision or in the order denying petitions for reconsideration that the Commission ever gave its fulltime proposal any real and substantial consideration.

From the point of view of the other applicants, if the Commission did give full consideration to RTI's amended proposal, they were deprived of any right to test that proposal in hearing, a right that some of them at least expressly demanded at the second oral argument. The Commission's failure to resolve RTI's status substantially prejudiced the other applicants as well as RTI itself.

D. The Commission Was Obliged to Consider Other Contentions of the Applicants

Neither in its Decision nor in its order denying petition for reconsideration did the Commission indicate that careful consideration had been given to serious and substantial contentions advanced by the parties. Community, for example, had urged the Examiner and the Commission to give consideration to Hanna's broadcast experience as manager of the Cornell University stations at Ithaca, New York. The Examiner and the Commission both refused to do so on the ground that Hanna had no ownership interests in those stations. But Community was claiming, of course, not just a credit for the performance of the stations managed by Hanna but also a credit for his broadcast experience. Past broadcast record and broadcast experience are separate factors under the Policy Statement, and Community was clearly entitled to credit for Hanna's experience, regardless of whether the Commission was right in ignoring the quality of his broadcast record. Flower, for example, was given credit for Larson's broadcast experience,

even though the evidence was insufficient to permit a judgment as to the quality of his broadcast record. In the case of Hanna, there was abundant evidence of the high quality of his performance, but the Commission's Decision and order denying petitions for reconsideration give no indication of whether his broadcast experience was taken into account at all.

The Commission was also silent about Heritage's strongly urged objection that the demerit assessed against it was improper. Heritage contended that the precise nature of the SEC action referred to in ¶12 of the Decision had never been established on the record, that the action was in any event insignificant as to Heritage because the person involved held only a 2% interest in Heritage, that the demerit violated administrative due process in that it retroactively imposed an evidentiary burden on an applicant without designation of an issue or prior notice, and that it violated the Policy Statement's injunction against consideration of "minor blemishes" and against the receipt of character evidence without a designated issue. There is no indication in the order denying petition for reconsideration that the Commission gave any consideration whatsoever to these contentions.

Nor did the Commission give any indication that it had given any consideration at all to the contentions of Citizens and Main that changes in the broadcast industry since 1959 had been so substantial that the value of Larson's pre-1959 experience had been substantially diluted. Citizens supported its contentions with an uncontradicted affidavit establishing the exact nature of the substantial changes that had occurred. But despite its professed desire to decide the case "on the basis of the facts as they now exist" (Decision, ¶6(e)), the Commission ignored these contentions, as, indeed, it did all other contentions and proposals contained in the petitions

for reconsideration.

This court dealt with similar circumstances in Greensboro-High Point Airport Authority, 97 U.S. App. D.C. 358, 231 F.2d 517 (1956), where it said (97 U.S. App. D.C. 362, 363, 231 F.2d 521-22):

"... the fact remains that Greensboro has not received a plain answer to its charge of discrimination. We think it is entitled to one. The issue was flatly raised, and was relevant to the Board's ultimate determination as to what the public convenience and necessity required. The Board's failure to supply an answer was not harmless error but prejudiced Greensboro's position in its efforts to obtain judicial review. We think the Board should now make appropriate findings of fact on the issue, and state 'the reasons or basis' for its conclusion."

#### E. The Commission Arbitrarily and Capriciously Rejected or Ignored Requests for Further Hearing

Three parties--Star, Heritage and Main--asserted at the second oral argument that the case should be remanded for a further hearing. (T. 9895, 9910, 9963.) Star asserted that this was desirable so that changes in the applications could be evaluated.<sup>1/</sup> (T. 9895.) Counsel for Community indicated a willingness to participate in a further hearing (T. 9897), and several insisted a further hearing should be held if the Commission accepted RTI's amendment specifying fulltime operation. (T. 9970, 9982, 9983, 9992.)

The Decision, however, gave no indication that the Commission had even considered calling for further hearings. The matter was raised again in the petitions for reconsideration. Heritage and Main related it to their assertion that the Initial Decision was invalid. (See pages 84-92, infra.) Citizens, however, urged that a further hearing was necessary as a matter of law because of the staleness of the record and the Commission's inability

<sup>1/</sup> "During this period of time, have any of the principals been incapacitated? Have any lost interest? Are any no longer available to perform the functions which the application proposes? Have any made other commitments?" (T. 9895.)

to make meaningful distinctions among the applicants on the basis of it:

"... if a grant is not made to Citizens on this petition for reconsideration, then the only reasonable alternative is to order a further hearing in which the applicants can update their proposals and undergo a new comparative evaluation. The elderly quality of the record (five years old) and the Commission's difficulty in finding significant differences between the applicants take such a procedure out of the area of discretion and make the procedure legally mandatory. That is, if the Commission cannot find any meaningful differences on this stale record, and apparently it can't in view of the unsoundness of the grant to Flower, it is obliged to order a hearing on an updated record. While Citizens urged at the oral argument that there was no need for a further hearing, it did not know then that the decision would rest on a phantom distinction among the applicants.

"A further hearing is, of course, necessary, as shown above, if the Commission continues to rely on the supposed superiority of Flower's integration. There are too many unanswered questions about the quantity and quality of Flower's proposed integration. The case has been decided on a will-of-the-wisp, a distinction that lacks foundation in logic or fact."

The order denying petitions for reconsideration made no reference to Citizens' assertion that the record was too stale to support a decision or to its contention that a further hearing was legally necessary. This was highly arbitrary. The Commission knew that there had been substantial changes in the composition of the applicants. It had before it uncontradicted evidence that there had been substantial changes in the broadcast industry during the period that Larson had been away from it; and in view of the fact that its choice of Flower rested primarily on Larson's broadcast experience it had an obligation to take those changes into consideration. This was in strange contrast to the Commission's action two

years earlier, on May 13, 1965, directing the filing of up-dating amendments and inviting a reassessment of the public's programming needs. Two years later, with the record much staler, the Commission failed even to acknowledge reasonable demands to conduct further proceedings so that the case could, indeed, "be decided on the basis of the facts as they now exist." The Commission did not, in fact, decide it on that basis but decided, instead, on a very stale record.

**F. The Commission Unreasonably Ignored Proposals for Merger and Mediation**

References were made at the oral argument to the unsuccessful attempts of the parties to merge into a single entity to operate the channel on a permanent basis. On March 1, 1966, the Commission's Review Board had rejected a proposal by Flower, Genesee, and Community under which Flower and Genesee would dismiss their applications and obtain an interest in Community upon a grant of that application. In the same order, the Review Board rejected a proposal by Federal that the Commission, without further hearing, issue a permanent license to the operators of the interim station, assigning to each of them whatever percentage of ownership it found appropriate. The Review Board held that such procedures could not be approved in the absence of agreement among all parties. (FCC 66R-73.)

At the oral argument on May 22, 1967, several applicants declared a continued interest in a resolution of the case by merger; and two of them, Heritage and Main, expressly requested that the Commission attempt to effect a mutually agreeable merger by assigning the role of mediator to an individual Commissioner or by some other means.

When the Commission's Decision was released on August 3, 1967, it made no reference to the proposals for merger or mediation. Main's petition for reconsideration renewed the proposal for mediation (as an

alternative to the further proceeding which it asserted was necessary because of the lack of an Initial Decision); and RTI proposed in its petition for reconsideration that the Commission (as an alternative to awarding the channel to RTI) direct a merger of all applicants and assign stock participation in the merged corporation in accordance with the Commission's comparative evaluation of all applicants. The order denying petitions for reconsideration made no reference to those proposals.

The Commission's lack of response to these suggestions was, at best, unfortunate and unimaginative. In the unusual circumstances of this case, it was also arbitrary. The Commission was fully aware by this time that the parties had come close to merging on their own. Indeed, it had been stated at the oral argument on May 22, 1967, that (T. 9965):

"We came very close to a merger. If a certain smile had been made and a little give, we would have had it."

Similar situations had occurred before. For example, in the Syracuse television case, Commissioner Lee wrote a concurring opinion noting the desirability of a procedure under which mergers would be encouraged. Veterans Broadcasting Co., 4 RR 2d 375, 439 (1965). He doubted, however, if the Commission could require some or all of the applicants in a consolidated case to merge. (As it turned out, the competing applicants in that case did later merge into a single entity, with the Commission's approval. Syracuse Television, Inc., 11 RR 2d 817 (1967)) Had the Commission been willing to encourage a merger, or to act as a mediator, the public interest would have been served and further proceedings avoided. The Commission is apparently under the impression that it can do nothing to compel or urge a merger of competing interests, even after years of litigation. This case presents the court with an opportunity that may not soon recur to assure the Commission that it does, indeed, have the authority

(and in some cases, the obligation) to encourage a merger of mutually exclusive applications.

V. THE COMMISSION'S DECISION WAS UNLAWFUL BECAUSE NOT PRECEDED BY A VALID INITIAL DECISION CONTAINING CONCLUSIONS AS WELL AS FINDINGS; THE EXAMINER'S FAILURE TO APPLY THE COMPARATIVE CRITERIA TO ALL APPLICANTS MADE THE INITIAL DECISION INVALID, ESPECIALLY IN LIGHT OF THE DISMISSAL OF RAETA'S APPLICATION

As shown in the Statement of the Case, pages 8-11, supra, the Hearing Examiner's Initial Decision did not apply the Commission's comparative criteria so as to produce a ranking of all of the applicants. What the Examiner did was to treat the RAETA-RTI combination (and, to a limited extent, RAETA and RTI separately) as a standard against which all other applicants were measured. She simply made conclusions comparing RAETA (or RAETA-RTI) with the other applicants on the comparative criteria, but did not even purport to consider how these other applicants ranked vis-a-vis each other.

The issues which the Commission had designated for hearing directed the Examiner to "determine on a comparative basis" which applicant would best serve the public interest in the light of the "background and experience of each," the "proposals of each with respect to . . . management and operation," and the "programming service proposed in each of the . . . applications." (Emphasis added) The Administrative Procedure Act (as now codified in Title 5 of the United States Code) provides expressly that an initial decision "shall include a statement . . . of findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record." (5 U.S.C. §537; emphasis added.) But the Examiner did not do this. She determined "on a comparative basis"

no more than that (in her judgment) RAETA was superior to the other applicants on some of the comparative criteria. In this respect, she failed to make "findings and conclusions ... on all the material issues of fact, law, or discretion presented on the record." (5 U.S.C. §557(c).)

Upon the withdrawal of RAETA, the Initial Decision in this case was, therefore, stripped of what this court has held to be the most essential part of an initial decision, i.e., its conclusions. Channel 16 of Rhode Island, Inc. v. FCC, 97 U.S. App. D.C. 179, 229 F.2d 520 (1956). In that case, the Commission assigned an adjudicatory case to a Hearing Examiner with instructions to render an "initial decision" containing findings of fact only and reserved to itself the power to make the conclusions. This court reversed, holding that such a procedure violated Section 409(b) of the Communications Act which contained substantially the same language as Section 8(b) of the Administrative Procedure Act (now 5 U.S.C. §557). The Court squarely held that an Examiner's Initial Decision must include conclusions as well as findings of fact. The only exceptions are those noted in the statute (47 U.S.C. 409(a))--that is, where the Examiner becomes unavailable to the Commission, or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably requires that the record be certified to it for initial or final decision. Neither of those exceptions applied in Channel 16 and neither of them was relied upon by the Commission in the instant case. See SEC v. Chenery Corp., 332 U.S. 194 (1947.).

Channel 16 had been cited in the oral argument to support the contention that the Initial Decision was inadequate (T. 9912), and Heritage had relied on it to support the same point in its petition for reconsideration. But the Commission made no attempt to distinguish it; indeed, it did not refer to it at all. In fact, the only distinction between Channel 16 and this case is

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,277

STAR TELEVISION, INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

FLOWER CITY TELEVISION CORP.

Intervenor

No. 21,541

COMMUNITY BROADCASTING, INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

No. 21,542

CITIZENS TELEVISION CORP.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

No. 21,543

FEDERAL BROADCASTING SYSTEM, INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

No. 21,544

HERITAGE RADIO AND TELEVISION  
BROADCASTING CO., INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

No. 21,545

GENESEE VALLEY TELEVISION CO., INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

No. 21,546

MAIN BROADCAST CO., INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

No. 21,547

ROCHESTER TELECASTERS, INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

ON APPEALS FROM A DECISION AND A MEMORANDUM OPINION  
AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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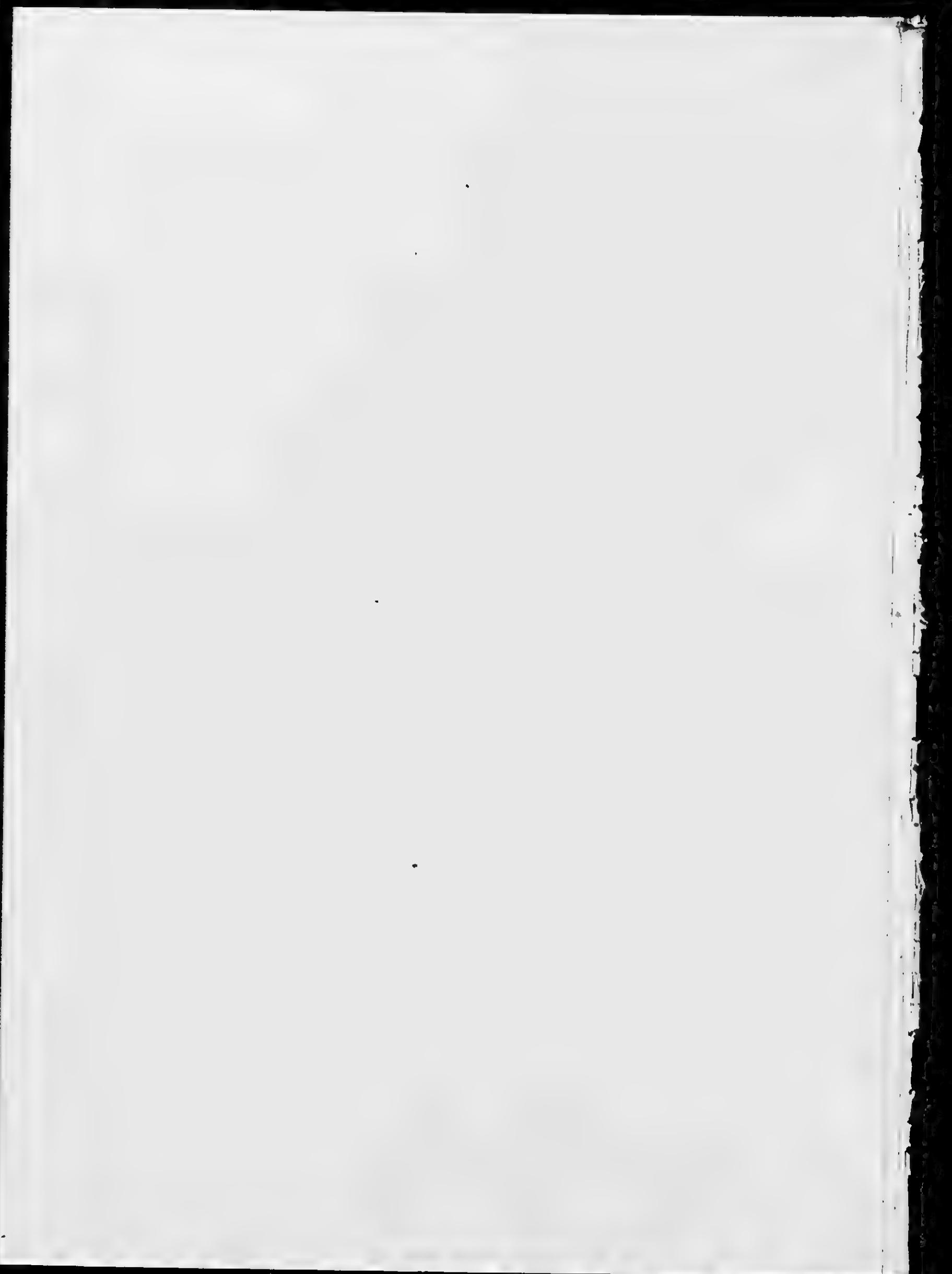
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United States Court of Appeals  
for the District of Columbia Circuit

FILED APR 17 1968

*Nathan J. Paulson*  
CLERK

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554



STATEMENT OF QUESTIONS PRESENTED

Appellee and intervenor submit that the questions presented in these consolidated appeals are as follows:

1. Whether the Commission's findings and conclusions are:
  - (a) supported by the evidence of record?
  - (b) precluded by previous precedents and policy statements?
  - (c) reasonable decisional judgments?
2. Whether the proceedings which resulted in a grant to Flower City were procedurally defective in violation of Section 8 of the Administrative Procedure Act, 5 U.S.C. 557, in the following respects:
  - (a) In view of the dismissal of RAETA's application, was the Examiner's decision inadequate, thereby affecting the proposed findings, exceptions, and oral arguments?
  - (b) Did the Commission's decision inadequately state its findings and conclusions?
  - (c) Did the Commission improperly refuse to admit certain proffered evidence?
  - (d) Was the Commission required to adopt the suggestion of one or two of the applicants that it force or persuade all the applicants to merge?

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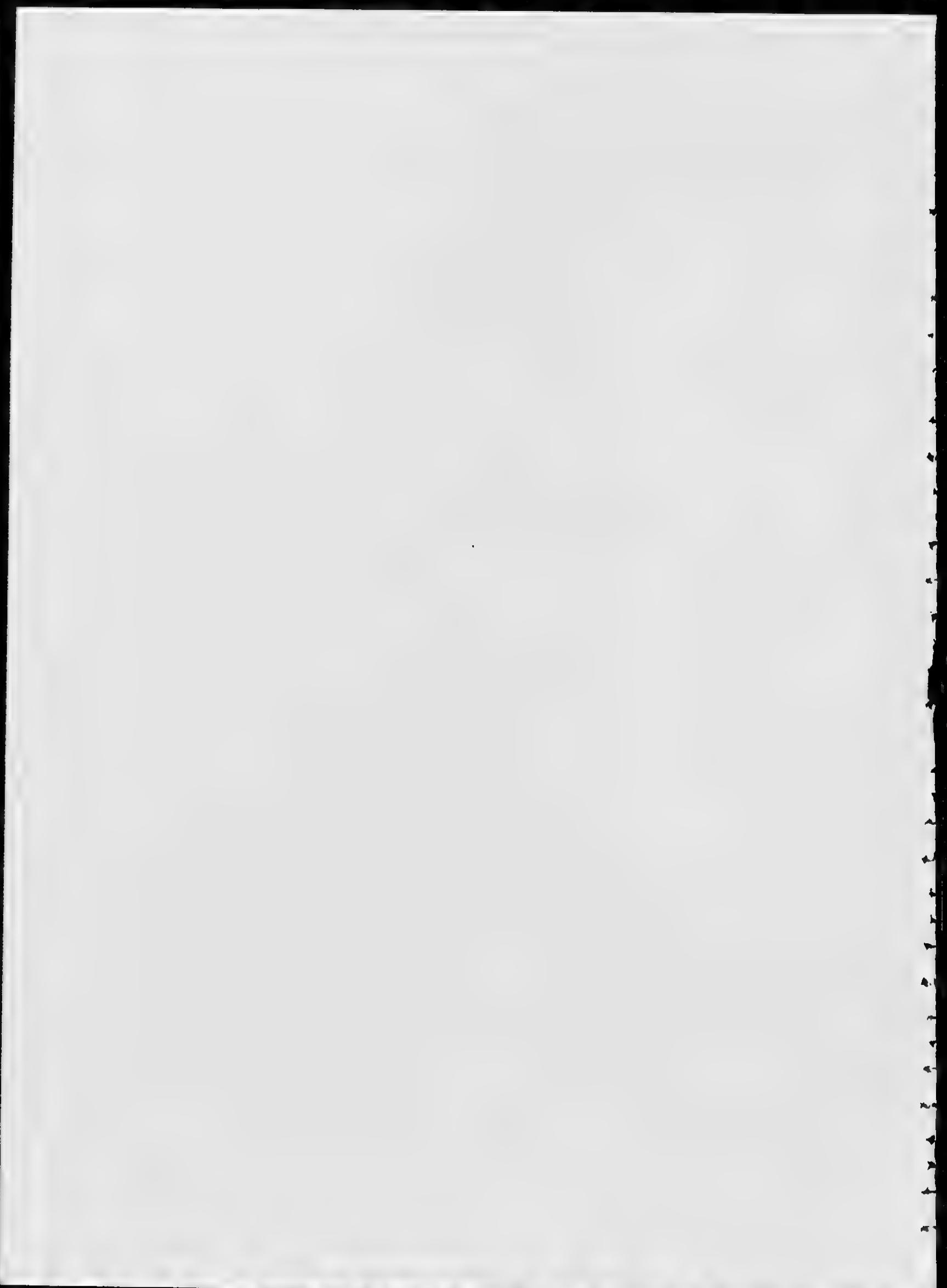
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,277

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STAR TELEVISION, INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

FLOWER CITY TELEVISION CORP.

Intervenor

---

No. 21,541

---

COMMUNITY BROADCASTING, INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

---

No. 21,542

---

CITIZENS TELEVISION CORP.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

---

No. 21,543

---

FEDERAL BROADCASTING SYSTEM, INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

---

No. 21,544

---

HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

---

No. 21,545

---

GENESEE VALLEY TELEVISION CO., INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

---

No. 21,546

---

MAIN BROADCAST CO., INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

---

No. 21,547

---

ROCHESTER TELECASTERS, INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

---

ON APPEALS FROM A DECISION AND A  
MEMORANDUM OPINION AND ORDER OF THE  
FEDERAL COMMUNICATIONS COMMISSION

---

BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF THE CASE

These appeals seek reversal of a decision of the Federal Communications Commission granting the application of intervenor Flower City Television Corporation for a construction permit for a television broadcast station to operate on Channel 13, Rochester, New York, and denying the mutually exclusive applications of appellants.<sup>1/</sup> Decision released August 3, 1967, 9 F.C.C. 2d 249, and the Commission's denial of reconsideration of its decision, Memorandum Opinion and Order, released November 29, 1967, 10 F.C.C.<sup>2/</sup> 2d 718.

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1/ Each of the above cases was consolidated by the Court on January 18, 1968. To facilitate recognition of the multiple parties, they will be referred to hereinafter as Star (Case No. 21,277), Community (Case No. 21,541), Citizens (Case No. 21,542), Federal (Case No. 21,543), Heritage (Case No. 21,544), Genesee Valley (Case No. 21,545), Main (Case No. 21,546), and RTI (Case No. 21,547).

2/ Only Star, Case No. 21,277, did not seek reconsideration of the Commission's August 3, 1967 decision.

Appellants' statement of the case is both selective in regard to the facts presented and argumentative. The following objective history of the proceeding before the Commission is therefore submitted in the belief that it will be of assistance to the Court.

Channel 13, a VHF Channel,<sup>3/</sup> was assigned to Rochester in August 1961 after a rulemaking proceeding in which the Commission found that a third full network service could not adequately compete on a UHF channel with the VHF stations in Rochester. Channel Assignment in Rochester, N. Y., 21 Pike and Fischer, R.R. 1748' (a)  
<sup>4/</sup> (1961). Following this assignment, each of the appellants applied for the channel.<sup>5/</sup> A comparative hearing began on June 4, 1962, and was concluded on December 7, 1962.

3/ Rochester has two other VHF television assignments. WHEC-TV, an affiliate of CBS, has operated on Channel 10 since 1953; WROC-TV, an affiliate of NBC, has operated on Channel 8 since 1949.

4/ During the rulemaking proceeding, the Commission found that Rochester, a metropolitan area of over a half million people and among the top fifty markets in the country, had only two operating television stations and that ABC's programs were not sufficiently available on these two stations, with some twenty of its programs not being carried. Because the VHF stations were securely entrenched in the market and UHF set conversion in Rochester was negligible, the Commission concluded that the only means of establishing a third viable commercial station was to assign an additional VHF channel to Rochester.

5/ On September 15, 1962, as a temporary move pending the outcome of the multi-party comparative hearing, the Commission authorized an interim corporation to operate Channel 13. All of the appellants except RTI but including the intervenor are members of this interim corporation. This Court on February 19, 1968, stayed the Commission's grant to Flower City pendente lite, at the same time, however, imposing an expedited briefing schedule. Accordingly, the temporary interim corporation continues to operate the channel.

In a January 22, 1964, decision, the examiner after making extensive findings of fact in regard to each of the applicants (9 F.C.C. 2d 266 through 519) recommended that the Commission grant the applications of Rochester Area Educational Television Association, Inc. (RAETA) and Rochester Telecasters, Inc. (RTI). RAETA and RTI had proposed a "share-time" operation on Channel 13 and their applications comprised a single proposal.

Preliminary to the examiner's decision, the parties had filed more than 2000 pages of proposed findings and conclusions. Subsequent to her decision, exceptions and supporting briefs were filed by all of the applicants. On the same date upon which these exceptions were filed, the American Broadcasting Company, not a party to the proceeding, filed an amicus curiae brief in which it argued to the Commission that an affiliation with share-time operator RTI would not give ABC a competitive place in the market in view of the large number of hours per week which would be allotted to RAETA for non-commercial educational use (R. Vol. 32, Brief of ABC, p. 3).

Six months later, all of the applicants but the proposed grantee asked to have the record reopened and remanded to the examiner to explore the effect on RAETA's programming of an application about to be filed by the Rochester School District for an in-school-viewing

system (Petition to Reopen the Record and Remand, R. Vol. 33).<sup>6/</sup>

At an oral argument held on November 2, 1964, before the Commission sitting en banc, each of the applicants was afforded an opportunity to address itself, in addition to its main argument, to this pending petition to reopen the record (Order, released October 23, 1964, Mimeo No. 5892).

Thereafter, on the basis of the parties' exceptions, briefs, and oral arguments, as well as upon the basis of the ABC amicus brief, the Commission did reopen the record to explore, inter alia, the impact of a possible grant to RAETA on its ultimate goal of a competitive third network service (Memorandum Opinion and Order, released May 13, 1965 (FCC 65-403)). At the same time, each of the applicants was given an opportunity to bring its application up to date with regard to involuntary changes and to reflect any programming changes occasioned, if such was the case, by any changed needs of the community. Before any additional hearing sessions were held, however, the applicants entered into a series of negotiations culminating in the dismissal of RAETA's VHF application (2 F.C.C. 2d 448 and 1029 (1966)).<sup>7/</sup>

<sup>6/</sup> It was not until after the Examiner had closed the record that a rulemaking proceeding (Docket No. 14,744) was finalized wherein the Commission established a new class of educational television service for the transmission of instructional and cultural material to multiple receiving locations. Appellants filed their request to have the record reopened in October, 1964, ten months after the Examiner's Initial Decision was released, at a time when they were informed that an application was about to be filed by the Rochester School District for authority to construct and operate an instructional television system.

<sup>7/</sup> RAETA now operates Station WXXI in Rochester, a UHF educational channel.

Meanwhile, the Commission had issued a Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965). As a result of that Statement, the Commission determined in this proceeding that no further evidentiary submissions would be required and that no useful purpose would be served by permitting the applicants to modify their programming proposals. Accordingly, the remand order was set aside and, upon the urging of various applicants (Joint Petition For Prompt Resolution of Case, March 2, 1965), the Commission concluded that the proceeding could be decided upon the basis of the existing record (Order released April 21, 1966, FCC 66-347). None of the parties objected to the Commission's decision not to hold a further hearing.

A second oral argument was held before the Commission on May 22, 1967. At its conclusion, after exhaustive consideration of the record and thorough analysis of the comparative qualifications of each of the applicants, the Commission chose Flower City as the operator of Channel 13.

The Commission adopted the examiner's findings of fact but, because the "share-time" application was no longer in existence, it found that the proceeding warranted substantially different conclusions and a different result from that recommended by the examiner. Accordingly, the Commission evaluated each of the

remaining applicants on the basis of the comparative criteria which had been explored at the hearing and in light of its subsequently issued Policy Statement in regard to these comparative criteria.

As a result of this analysis, it found that a number of the applicants were outstanding but concluded that in its view the public interest would be best served by a grant of Flower City's application, deriving assurance of good performance from the extensive broadcast experience of Flower's two fully integrated stockholders and from the fact that the great majority of Flower's stock is held by local residents, the majority of whom will devote some time to the operation of the station.

In assessing all of the other applicants, the Commission found that aside from Flower City, only Community and Federal had significant characteristics <sup>8/</sup> warranting a comparative preference on any score. <sup>9/</sup> Flower was preferred over Federal "since the public interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal." <sup>10/</sup> [Federal's

8/ The Commission had found Federal warranted a preference because it provided 100 percent integration of ownership and management and that Community was entitled to a preference because of its 15 percent stockholder's relationship to the "commendable record of performance" compiled by station WHAM.

9/ Only one applicant, Heritage, was assessed a comparative demerit because of the character qualifications of one of its stockholders.

10/ Commission Order denying petitions for reconsideration,  
10 F.C.C. 2d 718, 719.

single stockholder is already connected with a station in Rochester and another within seventy miles.] The Commission preferred Flower over Community "because of the former's superiority, arising from the experience factor, in the area of participation in station operation by owners."<sup>11/</sup> While Community's past broadcast record was commendable, the Commission held that it was not so outstanding as to warrant substantial weight since it was not the past record of Community itself, but rather that of a station in which a 15% Community stockholder held an interest.

In denying reconsideration of its decision, the Commission stated:

The petitioners are once again arguing that their versions of the facts require grant of their respective proposals for essentially the same reasons that they have been urging throughout this proceeding . . . [W]hile we concluded that Flower's application should be granted only after exhaustive consideration of this record and thorough analysis of the comparative qualifications of each of the applicants, we have again reviewed our Decision in light of petitioners' present contentions and we are convinced that they have presented no reason which warrants a departure from the findings and conclusions contained in that Decision. Under these circumstances, we remain convinced that the public interest will be best served by a grant of Flower's application and, thus, the petitions for reconsideration of that determination must be denied. <sup>12/</sup> (Footnotes omitted.) 10 F.C.C. 2d 720-21.

These appeals followed.

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<sup>11/</sup> Ibid.

<sup>12/</sup> Two Commissioners dissented from the Commission's grant to Flower City, Commissioner Bartley who, disagreeing with the majority as to the significance of the diversification of control of media of mass communications criterion, would have chosen Federal, notwithstanding the fact that its sole stockholder operates a radio station in Rochester, and Commissioner Johnson who would have chosen Community. However, Commissioner Johnson explained that his "preference is not a strong one, and the Commission's choice [of Flower City] is quite satisfactory." 9 F.C.C. 2d 260-263.

SUMMARY OF ARGUMENT

I.

Although appellants assert that their main argument "is not whether the Commission was right or wrong in preferring Flower but whether it complied with legal requirements in doing so," the bulk of their contentions challenge the correctness of the Commission's choice and are in fact nothing more than a restatement of factual contentions which were submitted to the Commission, carefully considered by it, but rejected. In our view, this case lies within the realm of the Commission's discretion which, as the Court pointed out in Pinellas Broadcasting Company v. F.C.C., 97 U.S. App. D. C. 236, 230 F.2d 204, cert. den. 350 U.S. 1007 (1956), is extremely wide where a qualified applicant has been selected and where procedural requirements have been met. There is no question here but that the requirements of the Administrative Procedure Act, 5 U.S.C. 557, were complied with. The Commission's proceedings were meticulous in procedural detail. Appellants were fully informed of all issues. They had a full opportunity to present their cases through the process of an evidentiary hearing followed by proposed findings. They were apprised of the grounds of the initial decision and were twice afforded a full opportunity to be heard at oral argument. Each of their exceptions was considered and ruled upon

and, most importantly, the Commission ultimately and with extreme care explained why its assessment of the findings when considered in light of its policies led it to select Flower City over the other applicants.

Contrary to appellants' contention, while Flower City's operation of Channel 13 will be with the fulltime participation of substantial owners--Larson, who will serve in the key position of general manager, and Auchincloss, who will serve in an equally vital capacity as program director--this was not the single factor which led the Commission to choose Flower City. Important also were the facts that these fully integrated owner-operators are men highly experienced over a long period of time in the field of broadcasting; that Flower City will provide a "new voice" to the community unassociated with any existing station in the area; that the great majority of Flower's stock is held by persons with area familiarity, 29 of its 31 stockholders being longtime residents of Rochester, and the remaining two planning to move to Rochester upon a grant to Flower; and the further fact that the great majority of Flower's stock is held by persons who will devote some time to the operation of the station. No other applicant possesses these collective characteristics.

Also, contrary to appellants' contention, the bases for the Commission's decision are clear, carrying out the objectives

set forth in the Commission's Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965), of a maximum diffusion of control of the media of mass communications, and fulltime participation in station operation by owners experienced in broadcasting and familiar with the area so as to achieve a greater likelihood of sensitivity to an area's changing needs and of programming designed to serve these needs. And the Commission did not commit error when, after adopting the examiner's extensive findings regarding each applicant's programming proposal, it concluded that none of the applicants was entitled to a preference in this area, that each of them had met its obligations in regard to becoming familiar with the community and area to be served, and that each of them had proposed an adequate service to meet the ascertained needs and interests.

The Commission properly gave no weight to the post-hearing efforts of various of the appellants to improve their comparative standing. Chief among these was Federal's last-minute promises to sell its broadcast interests in the Rochester area so as to improve its position under the diversification criterion. To have considered this matter, first raised approximately five years after Federal's application was filed, would have been improper and unfair to the very parties who now claim that the Commission has been unfair to Federal. Moreover, such consideration would have been

contrary to the decisions of this Court. See Central Broadcasting Company v. F.C.C., 126 U.S. App. D.C. 257, 377 F.2d 143 (1966); and Colorado Radio Corp. v. F.C.C., 73 U.S. App. D.C. 225, 118 F.2d 24 (1941).

II.

Finally, the only arguments made by appellants which fall outside the area of Commission discretion as discussed by this Court in Pinellas were (1) that there was no valid initial decision as required by the Administrative Procedure Act because of the ultimate dismissal of the RAETA application and the fact that the examiner had failed to rank in order of preference each of the losing applicants, and (2) that after the withdrawal of the RAETA application from the proceeding, a further hearing should have been held. In our view, these contentions are entirely without merit. The examiner's initial decision complied with all of the requirements of the Administrative Procedure Act and of the Commission's regulations. It included an exhaustive statement of findings and ample conclusions of law, as well as the reasons therefor, upon all issues of law and fact. The initial decision was susceptible when released of becoming final Commission action. Under Section 1.276 of the Commission's rules, 47 CFR 1.276, however, this finality was precluded by the exceptions which were filed by the parties long

before RAETA's application was dismissed. Accordingly, such dismissal could not have deprived the initial decision of the validity which it had when it was released. Moreover, in Eastern Airlines v. C.A.B., 271 F.2d 752, 760 (2d Cir., 1959), cert. den. 362 U.S. 970, Eastern made the same argument as the appellants make here with regard to the ranking of the losing applicants. The Court stated that "where one of the competitive applications is held preferable to the others from the standpoint of public interest no further findings with respect to unsuccessful applicants is required." See also Continental Southern Lines v. C.A.B., 90 U.S. App. D.C. 357, 358, 197 F.2d 397, cert. den. 344 U.S. 831 (1952); Simmons v. F.C.C., 79 U.S. App. D.C. 264, 145 F.2d 578 (1944); Deep South Broadcasting Co. v. F.C.C., 107 U.S. App. D.C. 384, 278 F.2d 264 (1960); and N.L.R.B. v. Champa Linen Service, 324 F.2d 28 (10th Cir., 1962).

As to the second procedural point raised by appellants, we need only note that while in their exceptions some of the applicants had objected to the examiner's failure to rank the losing applicants among themselves, none of them argued then or at any time prior to the second oral argument held in May 1967 that it was necessary to remand this proceeding for the preparation of a new initial decision. Indeed, as late as March, 1967, the applicants joined in a petition urging the Commission to resolve this proceeding by issuing a final

decision. In view of these facts and circumstances, and the further fact that each of the applicants' extensive exceptions was considered in detail, we respectfully submit that none of the applicants in this proceeding has been deprived of any procedural right.

ARGUMENT

I. THE COMMISSION'S GRANT TO FLOWER CITY WAS MADE AFTER A PROCEEDING WHICH WAS METICULOUS IN DETAIL. EACH OF THE COMMISSION'S FINDINGS AND CONCLUSIONS IS AMPLY SUPPORTED BY THE RECORD.

Although appellants assert (Br. p. 41) that their main argument "is not whether the Commission was right or wrong in preferring Flower but whether it complied with legal requirements in doing so," we respectfully submit that the bulk of their contentions challenge the correctness of the Commission's choice and are in fact nothing more than a restatement of factual contentions which were submitted to the Commission, carefully considered by it, but rejected.<sup>13/</sup> This case, then, is typical of a host of appeals which have been brought to this Court over the years by losing applicants in comparative proceedings. The standard governing review of such proceedings was set forth in

13/ See, for example, Br. pp. 38 and 39, or Br. p. 45 where, using the technique of rhetorical questions, appellants suggest that the Commission has ignored their respective positions and endeavor to re-argue their cases de novo.

the following terms in Pinellas Broadcasting Co. v. F.C.C., 97 U.S. App. D.C., 236, 238, 230 F.2d 204, cert. denied 350 U.S. 1007 (1956):

"The controversy is in an area into which the courts are seldom justified in intruding. The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior to another in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is also true that the Commission's view of what is best in the public interest may change from time to time. . . . The courts cannot interfere so long as the process, the premises, and the judgment are not arbitrary."

See also Scripps-Howard Radio, Inc. v. F.C.C., 89 U.S. App. D.C. 13, 189 F.2d 677, 680, cert. den. 342 U.S. 830 (1951); McClatchy Broadcasting Co. v. F.C.C., 99 U.S. App. D.C. 195, 239 F.2d 15 (1956), cert. den. 353 U.S. 918 (1957); Florida Gulf Coast Broadcasters, Inc. v. F.C.C., 122 U.S. App. D.C. 250, 352 F.2d 726 (1965).

There is no question here but that the Commission's "process, . . . premises, and . . . judgment" were not arbitrary. There is no question but that the Commission complied with the requirements of the Administrative Procedure Act, 5 U.S.C. 557, and with the holdings of each of the cases cited by the appellants on this point. The

<sup>14/</sup> Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) and Greensboro-High Point Airport Authority v. CAB, 97 U.S. App. D.C. 359, 231 F.2d 517 (1956), relied upon by appellants, lend no support to their contentions for this is not a proceeding in which the agency made no findings and provided no analysis for its decision. To the contrary, the Commission made over two hundred and fifty pages of detailed findings and considered each applicant with regard to all issues, 9 F.C.C. 266-519.

Commission's proceedings were meticulous in procedural detail. Appellants were fully informed of all issues. They had a full opportunity to present their cases through the process of an evidentiary hearing followed by proposed findings. They were apprised of the grounds of the initial decision and were twice afforded a full opportunity to be heard at oral argument.<sup>15/</sup> Each of their exceptions was considered and ruled upon, 9 F.C.C. 2d. 258-260, and, most importantly, the Commission ultimately and with care explained why its assessment of the findings when considered in light of its policies led it to select Flower City over the other applicants, 9 F.C.C. 2d 253-257.

In their brief, appellants have attempted to demonstrate that the Commission acted unreasonably in its assessment of the comparative criteria, failed to give proper weight to certain decisional factors, and that it failed to make meaningful and comprehensive or supportable findings and conclusions. In particular, they discuss their proposals for integration of ownership and management (Br. 19-26, 37-47), their programming proposals (Br. 47-55), the application to this case of the Commission's Policy Statement Governing Comparative Television Proceedings (Br. 55-68), and certain matters which arose after the close of the hearing (Br. 70-82). We discuss these contentions below, showing that as to each the Commission's action lies well within the range of its discretion.

<sup>15/</sup> See A. F. of L. v. United States, 87 F. Supp. 324, 334 (D. D. C.) affirmed 338 U.S. 864 (1949).

A. Contrary To Appellants' Contention, The Commission's Basis For Selection Of Flower City Was Not Merely Flower's Proposed Ownership Participation But Rather A Combination Of Factors Leading The Commission To Conclude That Flower Is The Best Applicant.

Appellants argue (Br. 37-47) that the comparative criterion of ownership participation in station operation was "the most significant factor in the case" but that they are unable to discern "the reasoning" by which the Commission arrived at its decision. We will show below that (1) the Commission's selection of Flower City was based upon not one, but a combination of factors, and (2) that the bases for the Commission's decision are clear.

1. A Combination Of Factors Led To A Grant Of The Flower City Application. We emphasize at the outset that while Flower City's operation of Channel 13 will be with the full-time participation of substantial owners -- Larson, who will serve in the key position of general manager, and Auchincloss, who will serve in an equally vital capacity as program director -- this was not the single factor which led the Commission to choose Flower City. Important also were the facts that these fully integrated owner-operators are men highly experienced over a long period of time in the field of broadcasting; <sup>16/</sup>

16/ The reasonableness of the Commission's conclusion that the broadcasting and particularly the television experience of Flower City's owner-operators warrants a comparative preference becomes most apparent upon examination of the relevant findings. The experience of G. Bennett Larson, 10 percent stockholder, executive vice president and director of Flower City who will be Channel 13's general manager, commenced in 1926 at KDYL in Salt Lake City, Utah, where he was an announcer, entertainer and program director. In 1929, he became a producer-director for NBC Network Radio in New York. Over the years, he has directed

(cont'd)

that Flower City will provide a "new voice" to the community, unassociated with any existing station in the area; that "the great majority of Flower's stock is held by persons with area familiarity [29 of its 31 stockholders being long time residents of Rochester, active in its business and civic life, and the remaining two planning to move to Rochester upon a grant to Flower]; and the further fact that the great majority of its stock is also held by persons who will devote some time to the operation of the station. . .," 9 F.C.C. 2d, 254. We respectfully submit that the facts of this case, detailed at length at 9 F.C.C. 2d, 266-519, make clear that no other applicant possesses these collective characteristics.

16/ (cont'd) and produced such programs as the "Big Show" with Gertrude Niesen, the "Al Jolson Program," the "Gilette Safety Razor Program" with Milton Berle, the "Aldrich Family" and the "Kate Smith Daytime Show." From 1942-45 he served as vice president, general manager, and 20 percent owner of WWDC, Washington, D. C. Also, while vice president and general manager for the radio and television operations of the Bulletin, Philadelphia, Larson supervised the application for and construction of WCAU-TV in Philadelphia. Until 1959, he served as president, general manager and 20 percent owner of KDYL radio and KDYL-TV in Salt Lake City. In addition, he has served as producer of several remote pickups for NBC. While he was associated with KDYL, Mr. Larson initiated an abundance of local programs and received the National Headliners Club Award for outstanding on-the-spot coverage. 9 F.C.C. 2d, 268-269.

The Commission found the experience of Gordon Auchincloss, Flower's 8.33 percent stockholder who will serve as program director of Channel 13, to be of no less quality than Mr. Larson's. Auchincloss has served as writer, producer, and director of such programs as "Your Hit Parade," "Information Please," "Cities Service Concert," and "The Sophie Tucker Show." His activities have ranged from the production of a \$125,000 network show to a \$450 1-hour production, involving 23 participants, for a station in Houston, Texas. Since 1933 when he began working as an announcer on radio station WCAP in Asbury Park for the summer, he has been closely associated with a wide variety of programs in both radio and television. He has won first place in the Education Film Library Festival and at the National Visual Presentation Association in connection with films he has produced, 9 F.C.C. 2d, 269-270.

Appellants argue, however, that on any one subfactor considered by the Commission at least one of the losing applicants scored better than Flower City. We answer this contention simply by pointing to the Commission's pronouncement in its Policy Statement that "various factors cannot be assigned absolute values . . . and the differences between applicants with respect to each factor are almost infinitely variable," 1 F.C.C. 2d, at 393. Appellants fail to assess each of the variables with regard to each applicant for to do so, we submit, would show that the Commission's conclusion was entirely reasonable.

2. The Bases For The Commission's Decision Are Clear. In its Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d, 393, 394 (1965), the Commission stated that one of the "primary objectives toward which the process of comparison should be directed" is "a maximum diffusion of control of the media of mass communication,"<sup>17/</sup> and that in this connection "other interests in the principal community proposed to be served will normally be of

<sup>17/</sup> The basic importance of diversification of mass media and the government's obligation to prevent a concentration of control of the source of news and opinion has been long established. United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Scripps-Howard Radio, Inc. v. F.C.C., 89 U.S. App. D.C. 13, 189 F.2d 677, cert. den. 342 U.S. 830 (1951). See also Associated Press v. United States, 326 U.S. 1, 20 (1944).

most significance, followed by other interests in the remainder of the proposed service area." In light of this, the Commission's decision noted that Federal is itself the licensee of radio station WSAY in Rochester and its 100 percent stockholder, Gordon P. Brown, is the licensee of WNIA, Cheektowaga, N. Y., only seventy miles removed from Rochester. Because "none of the other applicants is otherwise associated with the media of mass communications to any significant extent," the Commission concluded "an equal preference must be given to each of those applicants over Federal on this very important criterion," 9 F.C.C. 2d, 253-254.

The Commission also stated in its Policy Statement, 1 F.C.C. 2d, at 395-396, that it was "primarily interested in full-time participation" in station operation by owners because it is "inherently desirable that legal responsibility and day-to-day performance be closely associated. In addition, there is a likelihood of greater sensitivity to an area's changing needs, and of programming designed to serve these needs, to the extent that the station's proprietors actively participate in the day-to-day operation of the station." The Commission indicated that particular weight would therefore be given where staff positions, such as general manager or program director, were to be held by owners. The Commission observed

that it would also consider other "attributes of participating owners, such as their experience and local residence . . . in weighing integration of ownership and management" for while ownership management is important, its value is increased if the participating owners are local residents. The Commission explained that participation by "a local resident indicates a likelihood of continuing knowledge of changing local interests and needs." It added, however, that "[o]f course, full-time participation is also necessarily accompanied by residence in the area," 1 F.C.C. 2d, at 396 n. 7. Finally, the Commission stated that a "slight credit" would be given for "the local residence of those persons with ownership interests who cannot be considered as actively participating in station affairs on a substantially full-time basis but who will devote some time to station affairs." 1 F.C.C. 2d, at 396.

Applying the foregoing to the facts of this case, the Commission assessed the strengths and weaknesses of each applicant as follows, 9 F.C.C. 2d, at 254:

"On this important factor all of the applicants, with the exception of Genesee and Heritage, propose full-time participation by a substantial percentage of the stock ownership, but none, with the exception of Federal, proposes to have more than one-half of the ownership interest represented in full-time station operation. Genesee has no full-time participation by any person with an ownership interest and Heritage has almost none. Federal has 100 percent integration of ownership with management. In addition,

Federal's participation is by a long-term local resident with many years of radio experience. Federal, therefore, is to be substantially preferred over the other applicants on this factor." [As indicated above, however, Federal was, in effect, out of the running because of the fact that it already operates a radio station in Rochester and another 70 miles away]. "Among the other parties with substantial integration, Flower ranks the highest, in view of the broad broadcasting, and particularly television, experience of G. Bennett Larson, and of the somewhat lesser broadcast experience of Gordon Auchincloss II. We recognize that the integration of Flower is not accompanied by past local residence, and that in this respect it is not the equal of RTI, Star, Main, and Federal. However, in view of the fact that the great majority of Flower's stock is held by persons with area familiarity and the further fact that the great majority of its stock is also held by persons who will devote some time to the operation of the station, as is also true of most of the other applicants, we do not believe that in this particular case the absence of past local residence by the two stockholders participating full time in the operation of the station is so significant. In addition, as we noted in the Policy Statement, persons participating full time in station operation by definition will become local residents. In view of our conclusions, we do not believe further ranking of the other parties, some of whom are very close, is necessary on this issue." 18/

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18/ Appellants argue (Br. 31) that this "discussion of the applicants' integration proposals was perfunctory and unenlightening." The short answer to this contention, which in different form permeates appellants' brief, is that appellants appear to have lost sight of the fact that, except as slightly modified in its ruling on exceptions, the Commission adopted the Examiner's extensive findings concerning each of the applicants in this proceeding. These must be considered in connection with each of the Commission's ultimate conclusions.

Appellants argue (Br. 55-58) that in reaching these conclusions the Commission misapplied its Policy Statement and hence committed reversible error. In particular, they take the position that whereas the Policy Statement places more weight on past local residence than on broadcast experience, the Commission reversed the order of significance when it determined to grant the Flower City application. We find no merit to this argument for while the Commission indicated that its primary purpose in issuing a Policy Statement regarding comparative broadcast hearings was to develop consistency and clarity of decision and to expedite the hearing process, such Statement was "not intended to preclude the full examination of any relevant or substantial factor." 1 F.C.C. 2d, at 399. In discussing the criterion of diversification of control of the media of mass communications, 9 F.C.C. 2d, at 395, the Commission observed that "[i]t is not possible . . . to spell out in advance the relationships between any significant number of the various factual situations which may be presented in actual hearings." Plainly, the same observation is applicable to each of the other comparative criteria. "Various factors cannot be assigned absolute values," 9 F.C.C. 2d, at 393.

Here, the Commission closely examined the make-up of each of the applicants and simply decided that because there was present in Flower City such a high degree of local ownership and long-time

familiarity with the civic and business life of Rochester, the fact that two of Flower's stockholders were not local residents was not deemed a deficiency. The long years of radio and television experience these stockholders proposed to bring to the day-to-day operation of the station, under the circumstances of this case, was held to offset their lack of past local residence.

Furthermore, we believe it should be stressed that the weight assigned by the Commission in its Policy Statement to the various comparative criteria in no way altered appellants' burden of proof. No new criteria were established. Rather, the Statement merely endeavored to clarify the Commission's assessment of the relative importance of the comparative criteria and to serve as a guide to aid the Commission in reaching reasonable judgments in specific factual contexts. See Optical Workers Union v. N.L.R.B., 227 F.2d 687 (5th Cir., 1955), cert. den. 351 U.S. 963 (1956); F.C.C. v. WOKO, Inc., 329 U.S. 223, 228 (1946); Pinellas Broadcasting Co. v. F.C.C., 97 U.S. App. D.C. 236, 230 F.2d 204, cert. den. 350 U.S. 1007 (1956). There was no intent that this Statement be considered inflexible.

<sup>18/</sup> While appellants cite (Br. 69) a series of Fifth Circuit cases which hold that an agency may not depart from a previously declared rule, these cases have no application here. The Supreme Court, in reversing a similar Fifth Circuit decision which gave a rulelike cast to an agency policy decision, explained: policy statements are "guides, not fixed rules as such, and [are] designed to inform businessmen of the factors that would guide Commission decision." F.T.C. v. Mary Carter Paint, 382 U.S. 46, 48 (1965), reversing 333 F.2d 654.

In sum, we submit that a reading of the Commission's decision makes clear that the Commission applied its Policy Statement to the facts of this case in an entirely reasonable manner and, further, that there is no merit to appellants' repeated urging that all they are seeking from the Commission is an "adequate statement <sup>19/</sup> of reasons." These reasons were clearly given. As the Supreme Court stated in Baltimore & Ohio Railroad Co. v. U.S., 298 U.S. 349, 359 (1936), "There is no requirement that the Commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached. Usual precision in respect of either would be impossible." See also Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 427 (1945); Florida v. United States, 282 U.S. 194, 215 (1931); United States v. B. & O. R. Co., 293 U.S. 454, 464 (1935).

<sup>19/</sup> For example, Citizens urges (Br. 38) that the Commission ignored the qualifications of its principals and failed to indicate why they were not preferred over Flower City. But there is no question that extensive findings were made with regard to Citizens, 9 F.C.C. 2d, at 320-339, and that the Commission ruled on each of the Citizens' exceptions, 9 F.C.C. 2d, at 260. The contentions of Star and Community (Br. 38) were similarly submitted to the Commission as exceptions to the examiner's decision (Star Exceptions 1, 2, 6, 7; Community Exceptions B 1 - B 4) and, as in the case of Citizens, the Commission specifically considered and ruled on each such contention, 9 F.C.C. 2d, at 258, 259.

B. The Commission Did Not Commit Error When, After Adopting The Examiner's Extensive Findings Regarding Each Applicant's Programming Proposal, It Concluded That None Of The Applicants Was Entitled To A Preference In This Area.

Appellants' assertion (Br. 47-55) that the Commission failed to resolve the programming issue and that in so doing it failed to consider "significant differences" between the various applicants is erroneous. A plain reading of the Commission's decision and of the Examiner's findings demonstrates otherwise. After taking approximately 6000 pages of testimony on the various programming proposals of the applicants, the examiner made individual findings with regard to each applicant's proposed programming.<sup>20/</sup> These findings, totaling about one hundred and twenty-four pages, were adopted by the Commission and served as a basis for its conclusions.<sup>21/-</sup>

After full consideration of the applicants' exceptions to the examiner's findings, and after giving consideration to its Policy Statement, 1 F.C.C. 2d, 397-398, the Commission concluded that it was

<sup>20/</sup> Plains Radio Broadcasting Co. v. F.C.C., 85 U.S. App. D.C. 48, 175 F.2d 359 (1949), on which appellants rely because it is "virtually identical" lends them no support for, as the appellants point out, the Commission "failed to make any findings" in Plains Radio. This is clearly not the situation here.

<sup>21/-</sup> The findings as to each of the applicants can be found in 9 F.C.C. 2d as follows: Flower City, pp. 354-364; Genesee, pp. 364-371; Star, pp. 371-379; Community, pp. 370-385; Heritage, pp. 385-393; Main, pp. 393-402; Federal, pp. 402-408; Citizens, pp. 408-425; and R.T.I., pp. 425-440.

"convinced that none of the applicants is entitled to a preference over any of the other applicants on the basis of its preparation and planning, its staffing, or its program policies and proposal," 9 F.C.C. 2d, at 254. The Commission explained its reasoning thus (9 F.C.C. 2d, at 251):

In the Policy Statement we noted that program plans often have to be changed to take account of new conditions when the successful applicant begins operation and that our experience indicates that the program plans of competing applicants are so similar that minor differences among them generally prove to be of no significance. For these reasons, we stated that no issue would ordinarily be designated for program plans and policies, or for staffing plans or other program planning elements, and that evidence on these matters would be considered under the standard comparative issue. As pointed out in the Policy Statement, each applicant has the responsibility for being familiar with the community and area to be served and for proposing an adequate programming service to meet the ascertained needs and interests. From our consideration of the record in this proceeding, we are persuaded that each of the applicants has met its obligations in this respect and that variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs. As we stated in the Policy Statement, such ordinary differences in judgment will not be compared in the hearing process when each of the applicants, as here, has demonstrated that it is able to carry out its proposal.

While the Commission's Policy Statement constituted a modification of its past practices in that its purpose was, in part,

to eliminate "from the hearing process time-consuming elements not substantially related to the public interest," 9. F.C.C. 2d, at 394, it has long been held that the Commission is not bound to deal with all cases at all time as it has in the past. <sup>22/</sup> F.C.C. v. WOKO, 329 U.S. 223, 228 (1946); Kentucky Broadcasting Corp. v. F.C.C., 84 U.S. App. D.C. 383, 385, 174 F.2d 38, 40 (1949). Especially is this so where, as here, the Commission's reasoning as expressed in its Policy Statement was entirely reasonable. Pinellas Broadcasting Co. v. F.C.C., 97 U.S. App. D.C. 236, 230 F.2d 204, cert. den. 350 U.S. 1007 (1956).

At the inception of this proceeding, the Commission had enlarged the standard comparative issue on programming "to determine whether there were particular types or classes of programs for which there was an unfulfilled need in the Rochester area and the extent to which the need would be met by each applicant." Appellants argue

<sup>22/</sup> However, neither the Policy Statement nor the Commission's decision here changes the applicant's responsibility to show that its program proposals are designed to meet the needs and interest of the area. In addition, decisional significance continues to be accorded to material and substantial differences between the applicant's program plans. This fully comports with established precedent. See Henry v. F.C.C., 112 U.S. App. D. C. 257, 302 F.2d 191 (1962) cert. den. 371 U.S. 821 (1963); Johnston Broadcasting Co. v. F.C.C., 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

23/

that although Star claims to have demonstrated such a need, the Commission ignored its showing. This is incorrect. The Commission was fully aware of Star's claims but, after considering all the applicants' programming proposals, it nonetheless found that the "variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs." The only applicant who had made a specialized programming proposal that warranted specialized consideration, the Commission found, was RAETA whose application had been dismissed, 9 F.C.C. 2d, at 251 n. 3.

Appellants next contend (Br. 53, 61-68) that Flower City should have been awarded a demerit because of its "inadequate preparation and planning." The thrust of their attack is centered on the fact that Flower City's initial contacts in regard to programming were only within the corporation. The findings herein, 9 F.C.C. 2d, at 267-277, reveal, however, that Flower's stockholders are long-time residents of Rochester, active in its business and civic

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23/ Appellants assert (Br. 51), for example, that Star's proposed 24-hour programming demonstrates the specialized nature of its proposal. But a reading of the examiner's findings, 9 F.C.C. 2d, at 371-376, shows no exceptional programming proposed by Star, particularly during the 1 to 7 a.m. segment. The bulk of this time is devoted to films and to repeat performances on video tape of station produced programs which appear elsewhere on the schedule and which were classified variously as Discussion, Education, Talk, Religious and News Programs. Furthermore, Star failed to adduce any substantial evidence, as for example a sampling of the listening public, which would have demonstrated a need or desire for such an unlimited television operation. Indeed, Star's own witness testified that he had attempted to ascertain if any television station in the United States now operated 24 hours a day and had heard that there was only one such station in Nevada. He did not know whether there had been any attempts in the past by television stations to so operate (Tr. 2961-2962).

life. Additionally, before the hearing began, approximately 55 contacts were made by 11 of Flower City's stockholders. The examiner specifically found, 9 F.C.C. 2d, at 359 n. 78, that the appellants' contention that these contacts "were superficial. . . is not supported by the record." She painstakingly set forth the philosophy of Flower City's program proposal, describing how broad program titles had originally been formulated as a vehicle within which specific program ideas could be reflected. Thus, the programming proposal contained in the original application had enough built-in flexibility "to accommodate programming ideas discussed in the contacts," 9 F.C.C. 2d, at 360-361.

We submit that any reasonable reading of the Commission's findings demonstrates that Flower City was far from derelict in its program planning. And none of the applicants has contended that Flower City's method of proceeding in regard to the making of its contacts in any respect prejudiced them.

<sup>24/</sup> Moreover, appellants' claim (Br. 67-68) based on the treatment accorded one of the applicants, Salt City, in Veterans Broadcasting Co. 38 F.C.C. 2d (1965), lends no support to their position. Salt City was 50% owned by a Providence, Rhode Island, department store and made no community contacts prior to designation for hearing, contenting itself with a study of the available statistical data. The Commission found that:

" . . . the Commission is concerned not so much with the programs initially proposed, as with whether the applicant would be continuously aware of the specific as well as general programming needs, and whether he would be reasonably prompt in his responses thereto. From the prehearing efforts exerted by Salt City, it is easier to picture a station awaiting official compilations of statistical data than one with its hand everpresent on the pulse of the Syracuse community." 38 F.C.C. at 57.

The record demonstrates at a glance that Flower City's composition and activities indicate a total lack of similarity between it and Salt City.

C. The Commission Properly Gave No Weight To The Post-Hearing Efforts Of Various Of The Appellants To Improve Their Comparative Standing.

As their final substantive argument, appellants lump together a series of matters which were not raised before the Commission until long after the hearing record was closed and in most instances not until the second oral argument was held. Essentially these were nothing more than belated attempts by various of the appellants to improve their own comparative standing. We will briefly discuss each point raised.

1. The Commission Properly Gave No Decisional Weight to Federal's Last Minute Promises to Sell (Br. 71-73). Federal, while participating in the full hearing and submitting proposed findings, followed by exceptions and oral argument before the Commission en banc at no time indicated an intention to sell its broadcast interests in the Rochester area. After oral argument, an extensive period was provided in which the Commission invited amendments. Still Federal remained silent. It was not until a second oral argument was held, approximately five years after its application was filed, that Federal's counsel made an oral promise that Federal would dispose of one of its two broadcast interests in the Rochester area.

The problems inherent in such oral promises are self-evident. The Commission does not accord evidential weight to statements made at oral argument unless all of the parties

are willing to stipulate thereto. There was no such stipulation here. In any event, at the time of the Commission's decision, no written petition to amend had been filed and no detailed information of any sort had been provided explaining exactly how Federal proposed to "dispose" of its Rochester area station.

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It is evident that Commission consideration of the bare, unsubstantiated promise of Federal's counsel at oral argument [or consideration of Federal's present bare statement of intent] would be procedurally improper and unfair to the other parties. The Commission has consistently disallowed amendments after the closing of the record which are designed to shore up weaknesses revealed by the hearing process. The reasonableness of this policy has been repeatedly upheld by this Court. See Central Broadcasting Company v. F.C.C., 126 U.S. App. D.C. 257, 377 F.2d 143 (1966); Guinan v. F.C.C., 111 U.S. App. D.C. 371, 297 F.2d 782 (1961); Colorado Radio Corp. v. F.C.C., 73 U.S. App. D.C. 225, 118 F.2d 24 (1941).

2. RTI Was Allowed to Amend Its Application But Only in Such a Fashion as to be Without Prejudice to The Other Applicants (Br. 75-78). RTI and RAETA had proposed a share-time operation on Channel 13, RAETA to be allocated 44 hours a week for educational

25/ On March 12, 1968, long after the petitions for reconsideration had been denied and several months after these appeals were filed, Federal, apparently realizing the inadequacy of its oral promise, filed a Petition to Amend the Record. Now Federal offers to sell both of its stations within five months after such time as the Commission awards it a construction permit for Channel 13.

programming and RTI to operate 83 hours per week. When RAETA voluntarily dismissed its application, long after the Examiner's decision was issued and after the first oral argument before the Commission, RTI sought to amend its application to specify fulltime operation. Although it first was of the view that RTI, having elected the type of proposal it would make, should not at this point of the proceeding be allowed to improve its competitive position, in an effort to be extremely fair, the Commission questioned all counsel at the second oral argument in regard to RTI's proposed amendment and then ruled:

On November 29, 1965, RTI filed a petition requesting leave to amend its application to specify full-time instead of part-time, hours of operation and to alter its financing proposal. Oppositions were filed by Flower, Star, Federal, Citizens, and the Broadcast Bureau, and RTI filed a reply in response to those oppositions. Because it appeared that grant of RTI's petition would require an additional hearing and would further delay the resolution of this proceeding, we concluded that RTI's petition for leave to amend its application should be denied, FCC 66-593, released July 8, 1966. During the May 22, 1967, oral argument, RTI again requested leave to amend its application to specify full-time operation and argued that a further hearing would not be required since the initial decision contains complete findings of fact with respect to all of the applicant's principals. After further consideration, we are persuaded that the public interest would be better served by permitting RTI, without altering its comparative qualifications, to bring its proposal up to date so that this proceeding can be decided on the basis of the facts as they now exist. For this reason, we shall grant RTI's request for leave to amend its application to the extent of permitting it to specify fulltime operation.

9 F.C.C. 2d at 253.

We find no merit to appellants' argument that the Commission unfairly limited the scope of RTI's amendment. RTI was allowed to establish its financial qualifications to operate fulltime. It had, at the original hearing, made a separate showing from RAETA on all of the comparative criteria. This showing was carefully considered by the Examiner and made the subject of detailed findings which the Commission adopted. There can be no question as to the reasonableness of the Commission's ruling that RTI should not be allowed to go beyond this kind of showing and, from the vantage point of hindsight, change its original proposal in a manner that would prejudice the comparative position of the other applicants.

3. The Commission Did Consider the Broadcast Interest of Flower's Stockholder, Harper Sibley (Br. 73-75). Appellants claim that the Commission should have considered the interest of Flower's stockholder Harper Sibley in Empire Broadcasting, which was at the time of the Commission's decision the proposed assignee of station KLIV, San Jose, California. The Commission did consider the matter thus:

Although both Star and Flower have amended their applications to reflect an ownership interest in the assignee of standard broadcast station KLIV in San Jose, Calif., by certain of their stockholders, we are not persuaded that such ownership interest should be given any significant weight in this proceeding, in view of KLIV's distance from Rochester and the less than controlling interests held.

9 F.C.C. 2d at 253, n.8.

This conclusion in no way conflicts with the Commission's Policy Statement, 1 F.C.C. 2d, at 394-395, wherein the Commission specifically stated, "The less the degree of interest in other stations . . . the less will be the significance of the factor." The Commission's judgment in this regard was clearly reasonable.

4. The Broadcast Experience of Community's Stockholder

Hanna Was Not Relevant; The Demerit to Heritage Was Fully Explained; And Other Factual Contentions of the Appellants Need Not Have Been Considered (Br. 78-80, 82-84). The short answer to appellants' contention that the Commission neglected to consider the broadcast experience of Community's stockholder Hanna is that the Commission did not neglect it. Rather it noted that Hanna planned to devote only fifteen hours per week to the station's operation--a station which proposed to broadcast 118 hours per week--and that he did not plan to reside in Rochester (9 F.C.C. 2d 255). As the Commission stated in its Policy Statement, previous broadcast experience is relevant only if the stockholder will participate "full-time or almost full-time in the station operation." See also 10 F.C.C. 2d at 720 n. 2. Accordingly, no great significance was attached to Hanna's experience.

Appellants' assertion that the Commission failed fairly to consider all of the evidence before assessing Heritage a demerit because of the character qualifications of one of its

stockholders is fully negated by the extensive findings of the examiner, adopted by the Commission, as well as by the Commission's discussion on this point, 9 F.C.C. 2d, at 256. And Citizens' and Main's allegations with regard to changes in the broadcast industry requiring a different assessment under the experience criteria are no more than unsupported generalizations raised long after the close of the record. It was not incumbent upon the Commission to consider such allegations. Colorado Radio Corporation v. F.C.C., 73 U.S. App. 225, 118 F.2d 24 (1941).

Finally, appellants urge that the Commission should have forced a merger of the competing applicants. The Commission, however, has no obligation to formulate applications; its obligation is merely to select from among qualified applicants the one which will best fulfill the purposes of the Communications Act, 47 U.S.C. 307.

Each of the above arguments in no way demonstrates reversible error but, instead, clearly shows the Commission's extensive efforts to conduct a proceeding which would not prejudice those applicants who were diligent in pursuing their applications.

II. THE EXAMINER'S DECISION IS IN FULL COMPLIANCE WITH THE ADMINISTRATIVE PROCEDURE ACT AND ALL OTHER AUTHORITIES.

As we indicated at the outset of our brief, all of appellants' arguments, although dubbed procedural, are actually

nothing more than a series of attacks upon the reasonableness of the Commission's choice of Flower City over the other Rochester applicants. This being so, they clearly lie within the limitations on review of comparative proceedings prescribed by this Court in its Pinellas decision. The only arguments advanced by appellants which fall within this stated exception are (1) that there was no valid initial decision, as required by the Administrative Procedure Act, because of the ultimate dismissal of the RAETA application and the fact that in her decision, the examiner had failed to rank in order of preference each of the losing applicants (Br. 84-91), and (2) that after the withdrawal of RAETA from the proceeding, a further hearing should have been held to adduce more evidence (Br. 80-82). The insubstantiality of these contentions is, in our view, illustrated by the complete lack of supporting authority.<sup>26/</sup> In addition, however, we note that in its Order denying reconsideration, 10 F.C.C. 2d 718, 719-720, the Commission considered these identical arguments and carefully enunciated its reasons for rejecting them. We submit that the Court should do likewise for the same reasons.

<sup>26/</sup> Channel 16 of Rhode Island, Inc. v. F.C.C., 97 U.S. App. D.C. 179, 229 F.2d 520 (1956), relied upon by appellants, lends no support to their contentions. In Channel 16, the examiner, at the direction of the Commission, made no conclusions. This, the Court found, was contrary to procedural requirements specified by law. Here, the examiner's conclusions were most extensive and the proceeding in all respects met the procedural standards of the Communications Act and the Administrative Procedure Act.

The Commission's statement follows:

Some of the instant petitioners have advanced the threshold contention that there has been no valid initial decision in this proceeding; that they have been deprived of their right to file exceptions to a proper initial decision; and that our decision is, therefore, procedurally defective. They urge that the failure of Presiding Examiner Annie Neal Huntting to rank each of the losing applicants under the comparative criteria and the dismissal of the application of the Rochester Area Educational Television Association, 2 FCC 2d 448 and 1029 (1965), render invalid the initial decision which was released in this proceeding. We are convinced that these contentions are entirely without merit. The initial decision prepared by Examiner Huntting made exhaustive findings of fact with respect to each applicant's showing under all of the comparative criteria, and included, ample conclusions of law and a comparative analysis of each of the applicants.

It is clear that the initial decision complies with all of the requirements of the Administrative Procedure Act and of our regulations, since it included a statement of findings and conclusions, as well as the reasons or basis therefor, upon all issues of law and fact; since the parties were fully informed of the issues and proposed grounds of the decision; and since the initial decision was susceptible when it was released of becoming final Commission action. Under section 1.276 of our rules, the initial decision in this proceeding was precluded from becoming a final action by the exceptions which were filed long before RAETA's application was dismissed, so that the latter action could not have deprived the initial decision of the validity which it had when it was released. It is also clear that each of the applicants filed extensive exceptions to the initial decision, obviously demonstrating that the parties had been fully informed of the issues and the proposed grounds of the decision.

While the exceptions of some of the applicants objected to the examiner's failure to rank all of the losing applicants among themselves in claiming that their proposals should be granted, none of the applicants argued then or at any time prior to the oral argument of May 22, 1967, that it was necessary to remand this proceeding for the preparation of a new initial decision. Indeed, as late as March 27, 1967, the applicants, which now claim that our final

decision is procedurally defective, joined in a petition urging us to resolve this proceeding by issuing such a decision. In view of all of these facts and circumstances and the further fact that each of the applicants' extensive exceptions was considered in detail, we are convinced that none of the applicants in this proceeding has been deprived of any procedural right and that these contentions must be rejected.

In addition, it should be emphasized that in their exceptions, supporting briefs and replies, the losing parties did not merely attempt to show that the examiner had erred in preferring the share-time applicants over their applications. Rather, each applicant went to great lengths to urge its superiority over each of the other applicants in the proceeding. None of them were of the view that their only challenge stemmed from RAETA and RTI (see Exceptions in the Joint Appendix).

The Commission's reasoning is fully supported by court decisions. See Eastern Airlines v. C.A.B., 271 F.2d 752 (2nd Cir., 1959), cert. den. 362 U.S. 970; Continental Southern Lines v. C.A.B., 90 U.S. App. D.C. 357, 358, 197 F.2d 397, cert. den. 344 U.S. 831 (1952); Simmons v. F.C.C., 79 U.S. App. D.C. 264, 145 F.2d 578 (1944). In Eastern Airlines, the appellant made the same argument as the appellants make here with regard to the ranking of the applicants. The Court stated at p. 760 that, "where one of the competitive applications is held preferable to the others from the standpoint of public interest no further findings with respect to unsuccessful applicants is required."

There is no question that had the examiner ranked each applicant, their positions would in no way have been improved; clearly the Commission is not required to make such non-essential findings.

Deep South Broadcasting Co. v. F.C.C., 107 U.S. App. D.C. 384, 278 F.2d 264 (1960); N.L.R.B. v. Champa Linen Service, 324 F.2d 28 (10th Cir., 1962).

CONCLUSION

For the foregoing reasons, the Commission's orders under review in these appeals should be affirmed and the Court's stay of the Commission's grant should be vacated.

Respectfully submitted,

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April 17, 1968

REPLY BRIEF FOR APPELLANTS

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

United States Court of Appeals  
for the District of Columbia Circuit

Nos. 21,277, 21,541-47

FILED APR 22 1968

STAR TELEVISION, INC. (No. 21,277); COMMUNITY BROADCASTING, INC. (No. 21,541); CITIZENS TELEVISION CORP. (No. 21,542); THE FEDERAL BROADCASTING SYSTEM, INC. (No. 21,543); HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC. (No. 21,544); GENESEE VALLEY TELEVISION CO., INC. (No. 21,545); MAIN BROADCAST CO., INC. (No. 21,546); ROCHESTER TELECASTERS, INC. (No. 21,547)

*Bethan J. Paulson*  
CLERK

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

FLOWER CITY TELEVISION CORPORATION,

Intervenor.

Appeals from a Decision and Order of the  
Federal Communications Commission

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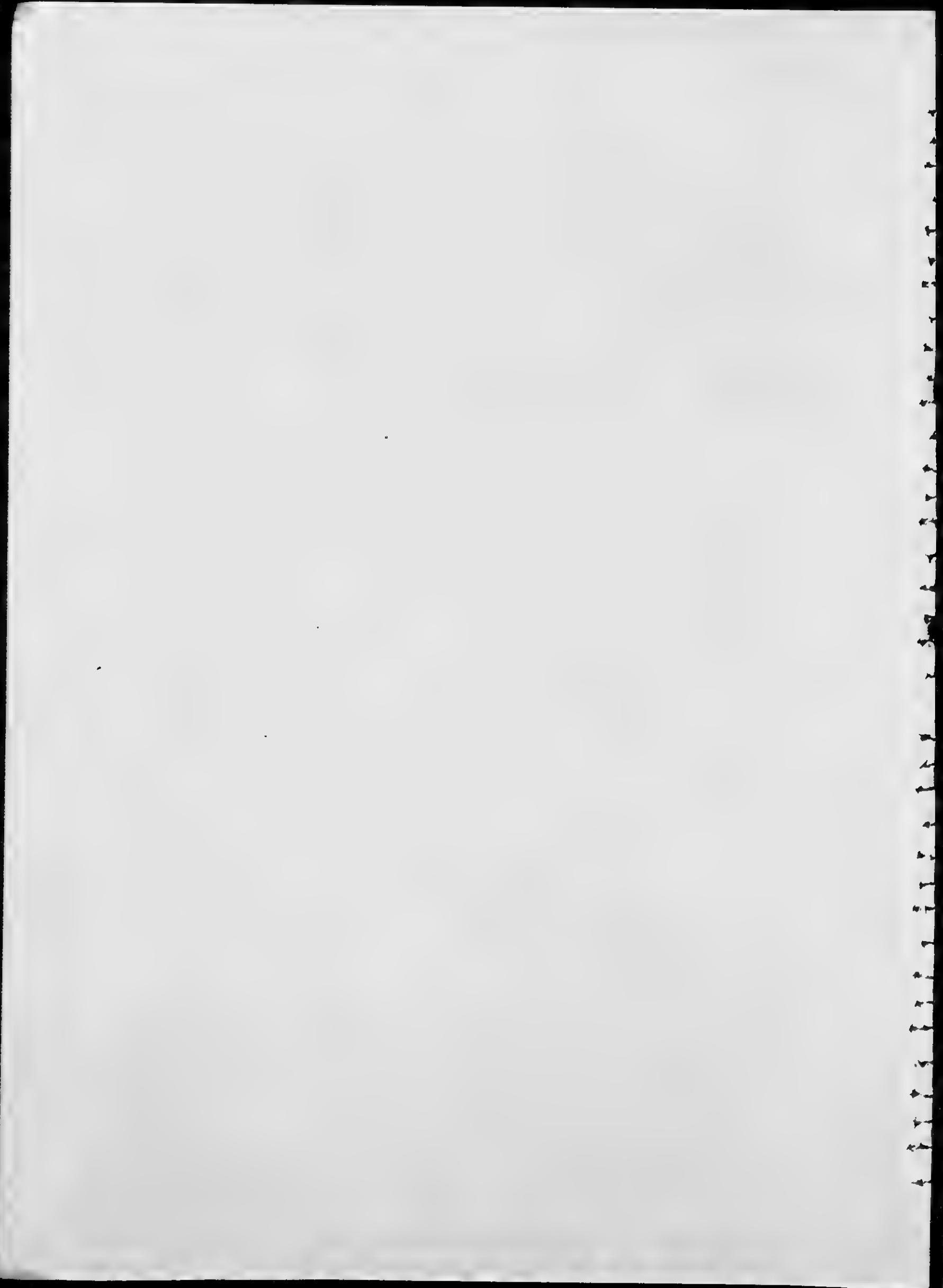
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UNITED STATES COURT OF APPEALS  
For the District of Columbia Circuit

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Nos. 21,277, 21,541-47

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STAR TELEVISION, INC. (No. 21,277); COMMUNITY BROADCASTING, INC. (No. 21,541); CITIZENS TELEVISION CORP. (No. 21,542); THE FEDERAL BROADCASTING SYSTEM, INC. (No. 21,543); HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC. (No. 21,544); GENESEE VALLEY TELEVISION CO., INC. (No. 21,545); MAIN BROADCAST CO., INC. (No. 21,546); ROCHESTER TELECASTERS, INC. (No. 21,547),

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

FLOWER CITY TELEVISION CORPORATION,

Intervenor.

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Appeals from a Decision and Order of the  
Federal Communications Commission

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REPLY BRIEF FOR APPELLANTS

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- I. THE COMMISSION'S FAILURE TO EXPLAIN ITS DECISION ADEQUATELY WOULD REQUIRE REVERSAL EVEN IF THIS WERE AN ORDINARY AND ROUTINE CASE; ITS PERFUNCTORIAL DISPOSITION OF THE CASE WAS ESPECIALLY ARBITRARY IN VIEW OF THE EXTRAORDINARY NATURE OF THE ISSUES INVOLVED

The Commission's General Counsel seems to be suggesting that the Court treat this case as perfunctorily as did the Commission. This case is, the General Counsel says, "typical of a host of appeals which have been brought to this Court over the years by losing applicants in comparative

proceedings" (Appellee Br., p. 15); and it can, accordingly, be disposed of merely by application of the principles set out in Judge Prettyman's opinion for the majority in Pinellas Broadcasting Co. v. FCC, 97 U.S. App. D.C. 236, 238, 230 F.2d 204, cert. denied, 350 U.S. 1007 (1956.) Intervenor describes these appeals as "garden variety", and it, too, makes the familiar invocation of Pinellas. (Intervenor Br., p. 18.)

This is wishful thinking. These descriptions simply will not fit. It is not an ordinary and routine thing for the Commission to award a broadcast channel to an applicant that made no effort to ascertain community needs before filing its application and whose programming proposal was put together in a Washington law office two days before filing by two stockholders who had never met each other before, had not met with their fellow stockholders, and knew nothing about the community to be served. Appellants cannot recall -- and they daresay appellee and intervenor cannot do so either -- "a host of appeals" in which the Commission refused to resolve an issue (e.g., whether there are particular types or classes of programs for which there are unfulfilled needs in the Rochester area.) And surely it is extravagant to describe as "garden-variety" an assertion that the Commission violated the Administrative Procedure Act by deciding a case without first considering a valid initial decision containing conclusions as well as findings. Nor is it an ordinary or routine thing for the Commission to choose an applicant primarily because of the quality of its proposed integration of ownership and management without giving any indication of the basis on which it preferred that party's integration proposal to the similar proposals of other parties. Appellants are at a loss to see how these issues can be decided under the "process, ... premises, and ... judgment" formula of Pinellas.

Appellants have no quarrel with Pinellas and the other, similar cases cited and relied upon by appellee and intervenor. They do submit, however, that the doctrine of those cases has no relevance or applicability

here. Perhaps the most effective answer to the contrary contention of appellee and intervenor is to invite the Court to compare the Commission's decision in Pinellas, especially the conclusions in that decision, with the decision in the instant case. (The Commission's decision in Pinellas is reported at 9 R.R. 719; it can also be found in the Joint Appendix in this Court's Case No. 12,545, bound in Volume 1057, Records & Briefs, United States Court of Appeals, D.C.) Whatever else might be said of the Commission's decision in Pinellas -- and both the appellant and dissenting Judge Bazelon had a great deal to say about it -- it could not be charged, and in fact it was not charged, that the Commission in that case failed to explain the reasons why it decided as it did. As Judge Prettyman stated in Pinellas, the Commission "explained at great length its choice of awardee." (230 F.2d 205.) The losing applicant's assertion on the Pinellas appeal was not that the Commission had failed to resolve issues, but that it had resolved them incorrectly. 1/

The appeals in this case are on a quite different ground. Here, unlike Pinellas, the applicants have never received an answer to their basic assertions. That is why it was possible, and indeed necessary, for appellants to use what the General Counsel calls "the technique of rhetorical questions" (Appellee Br., p. 15), which he finds so irksome and, apparently, so embarrassing. The fact of the matter is that the Commission did not answer those questions. Had it done so, appellee and intervenor could

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1/ One qualification must be made. One of the applicants in the Pinellas case proposed Tampa, Florida, as a station location and the other proposed St. Petersburg. One of the points asserted on appeal by the losing applicant was that the Commission's decision was defective for failure to make adequate findings and conclusions as to the comparative needs of the two communities. Since the point had not been raised below, the court refused to consider it on appeal. It is only in this rather minor respect that the appeal in Pinellas resembles the appeals in this case.

very readily have demolished Part I of appellants' brief simply by pointing to the answers. They did not do so because they could not do so. The answers nowhere appear. The questions posed in Part I of appellants' brief are not rhetorical; they are, rather, questions that the Commission was obliged to answer and that it failed to answer.

To take just one example, nowhere in the Commission's decision or in the order denying petitions for reconsiderations is there any indication of the process of reasoning by which the Commission concluded that the broadcast experience of Larson of Flower (or of Larson and Auchincloss together) was preferable to the broadcast experience of Fraiberg of Citizens. The answer to this question is essential to the question of whether Flower should be preferred to Citizens, or Citizens to Flower, under the criterion of integration. (A similar question exists, of course, with respect to every other pair of applicants.) Part I of appellants' brief does not assert that the Commission was obliged to prefer Fraiberg to Larson, nor does it in any other respect constitute an argument for any particular applicant. It does assert that appellants do not know why, or for what reasons, or on what basis, the Commission preferred Larson to Fraiberg. Appellants have not received from the Commission any answer to that question, or to the other questions raised in Part I of their main brief. The General Counsel asserts that the bases of the Commission's decision are clear. They are not clear to appellants, and appellants respectfully submit that they do not see how they can be clear to the Court either. Appellants do not know the answers to the questions posed in Part I of their brief, which the General Counsel has incorrectly characterized as "rhetorical." Nor does the General Counsel know the answers to those questions. Nor the intervenor. Nor the Court. For that reason alone, this case must be reversed.

## II. COMMISSION COUNSEL CANNOT PATCH UP THE DEFICIENCIES IN THE DECISION BY POST HOC RATIONALIZATIONS

The Commission's summary and perfunctory treatment of the issues and contentions in this case has placed its General Counsel in the unenviable position of making the kind of post hoc rationalizations that the courts have condemned time and time again. NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438, 443-44 (1965); Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962); SEC v. Chenery Corp., 332 U.S. 194 (1947.) A notable example of this occurs in footnote 16 on pages 18-19 of appellee's brief, where the General Counsel notes certain facts about the experience and background of Larson and Auchincloss; these he contends, demonstrate the reasonableness of the Commission's preference for Flower (over all applicants but Federal) under the criterion of integration of ownership and management. But how can the General Counsel know that these are the facts that the Commission principally relied on in reaching that conclusion? More important, if these were the facts that influenced the Commission's judgment with respect to Larson and Auchincloss, how did the Commission weigh those facts against other facts relating to the broadcast experience of other integrated principals -- such as Fraiberg of Citizens, Forman of Star, and Green and Hanna of Community? Although it is to the General Counsel's credit that he fails to carry his speculations that far, the fact remains that the basis of the decision cannot be known until that question (among others) has been answered -- and answered, moreover, by the Commission rather than by its General Counsel. As the Supreme Court said in NLRB v. Metropolitan Life Insurance Co., 380 U.S. 444:

"... the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action ...' Burlington Truck Lines v. United States ... [371 U.S. 168]; see Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for

that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' Securities & Exchange Comm'n v. Chenery Corp., supra, at 196."

### III. THE "COLLECTIVE CHARACTERISTICS" THAT THE COMMISSION'S GENERAL COUNSEL CLAIMS EXCLUSIVELY FOR FLOWER ARE, IN FACT, POSSESSED BY OTHER APPELLANTS AS WELL

Appellee asserts, at pages 18-19 of its brief, that it was a combination of factors that led the Commission to choose Flower and that no other applicant possesses the collective characteristics possessed by Flower. Wholly apart from the fact that this is another post hoc rationalization of the kind condemned in Chenery and the other cases cited above, it is just plain wrong, as a moment's analysis will show.

In the first place, if nothing else is clear from the Commission's decision in this case, it is clear that Flower was preferred to all applicants except Federal because of the proposed integration of Larson and Auchincloss and that, to the extent that other factors were considered (such as broadcast experience and local residence), they were considered as aspects, or sub-factors, of the integration criterion. See §§ 8 and 13 of the decision and §§ 2 and 3 of the order denying petitions for reconsideration. The General Counsel asserts, however, that there were a number of other factors, separate and apart from integration, that led the Commission to choose Flower. It cites first, as a separate factor, that Flower's integrated stockholders had extensive broadcast experience. But this was true also of Star, Community, and Citizens. Next, the General Counsel notes that Flower would provide a "new voice" to the community. But so would every other applicant except Federal, as the Commission

recognized in preferring all other applicants to Federal under the diversification factor. The next factor cited is that the great majority of Flower's stock is held by persons with area familiarity. This was true of all applicants without exception. Finally, the General Counsel's brief cites as a separate factor that the great majority of Flower's stock is held by persons who will devote some time to the operation of the station. This, too, is true of a number of other applicants, including Star, Community, and Citizens.

It is clear, therefore, that the other factors cited in appellee's brief are not distinctive. To be blunt about it, it is simply not true that "no other applicant possesses these collective characteristics." (Appellee Br., p. 19.) At least three other applicants possess each and every one of the characteristics listed. Citizens does; so does Star; so does Community. The General Counsel supports its assertion by a citation to 253 pages of the Initial Decision. (9 F.C.C.2d 266-519.) The Court will, of course, examine the Initial Decision as well as the Commission's final decision. It is not necessary, however, to read through these 253 pages for the particular purpose of testing this particular assertion. Its falsity is amply demonstrated by the factual summaries of the integration proposals contained on pages 21-26 of appellants' main brief.

#### IV. THE COMMISSION DID NOT RESOLVE THE SPECIAL NEEDS ISSUE

Appellee and intervenor both assert that the Commission did, in fact, resolve subsection (d) of the comparative issue, which called for a determination of whether there were unfulfilled programming needs in the area and the extent to which the applicants would meet those needs. To appellants, it seems perfectly clear that the Commission expressly refused to resolve that issue. That issue, it should be noted, did not call merely for a comparison of programming proposals, as did subsection (c) of the comparative issue.

Rather, it called for an identification of needs. If, as appellee and intervenor assert, the Commission did resolve subsection (d), then it should be possible to find in the decision a statement of the unfulfilled needs that exist, or a statement that there are no unfulfilled needs in the Rochester area. Appellants can find neither in the Commission's decision.

As noted in appellants' main brief, applicant Star has contended throughout the case, and still contends today, that it ascertained the existence of unmet needs and fashioned programming specifically designed to meet those needs. Other applicants also claimed a preference for their efforts to ascertain the programming needs of the public. The question now before the Court is not whether these contentions were correct or not, but whether those contentions should have been ignored altogether. Footnote 2 in ¶3 of the decision says flatly that "the evidentiary showings submitted with respect to RAETA's specialized proposal are now moot." But, as already noted, RAETA was not the only applicant to submit evidence, and claim a preference, under subsection (d). The evidence and claims of other applicants under that issue cannot lawfully be disregarded simply because RAETA withdrew from the case.

#### V. APPELLANTS WERE SUBSTANTIALLY PREJUDICED BY THE LACK OF COMPARATIVE CONCLUSIONS TO WHICH EXCEPTIONS COULD BE FILED BEFORE THE ISSUANCE OF A FINAL DECISION

Appellee answers appellants' complaints about the Hearing Examiner's failure to apply the comparative criteria so as to produce a ranking of all applicants by a reference to Eastern Airlines v. CAB, 271 F.2d 752 (2nd Cir., 1959), cert. denied, 362 U.S. 970, and other cases cited therein. However, the language from Eastern relied on by appellee has no applicability here. That case was an appeal from the CAB's action in a route case. Capitol Airways, an uncertificated carrier operating under Board exemption, had sought particular routes. The Board granted those routes to other, certificated

carriers. Capitol complained on appeal that the Board should have made findings as to each applicant's fitness and as to whether there was a need for its service. Taking note of the explicit language of the governing statute, the Second Circuit held that this requirement applied only where a certificate was to be granted. It did not apply in a route case where the Board had decided not to grant a certificate to an applicant. That was Capitol's plight, and it clearly is not analogous to the instant case where all applicants were fully qualified and equally entitled to comparative consideration.

Appellee also cites Continental Southern Lines v. CAB, 90 U.S. App. D.C. 357, 197 F.2d 397, cert. denied, 344 U.S. 831 (1952); but it, too, has no relevance to the instant case. Continental was one of the cases relied on by the Second Circuit in disposing of Capitol Airways' appeal in Eastern. All that the Court held in Continental was that, once the Board had concluded that a carrier could not provide the immediate service that the public interest required, it was not required to give its application further consideration. The other case relied on in the Eastern opinion, North American Airlines v. CAB, 100 U.S. App. D.C. 40, 241 F.2d 445 (1957), was similar in this respect to Continental; it held that a route applicant that did not meet basic qualifications was not entitled to comparative consideration.

The other cases cited by appellee are also inapposite. Deep South Broadcasting Co. v. FCC, 107 U.S. App. D.C. 384, 278 F.2d 264 (1960), was not a comparative case; it merely held that, once the Commission had found a broadcast applicant lacked basic qualifications (such as the financial capacity to construct the proposed facilities), it need not resolve other issues that had been designated for hearing. NLRB v. Champa Linen Service, 324 F.2d 28 (10th Cir., 1962), merely held that it was proper for the Board to adopt an Examiner's report and that it was not necessary for it to

make findings on immaterial issues. Simmons v. FCC, 79 U.S. App. D.C. 264, 145 F.2d 578 (1944), was similar to Deep South; it merely held that it is not necessary to make further findings after holding that a broadcast applicant cannot meet basic qualifications.

The cases relied on by appellee would be significant only if there were an issue as to basic qualifications involving one or more of the appellants. Such is not the case. All of these appellants, as well as intervenor, were qualified for a grant. All of them were entitled to address themselves, in exceptions, to comparative conclusions, as well as findings. They unquestionably did not enjoy that right in this case. Once the RAETA application had been dismissed, there were no comparative conclusions outstanding to which the parties could file exceptions. And, in any event, their exceptions had long since been on file.

Intervenor asserts, however, that appellants were not prejudiced since they had ample notice of the Examiner's findings and ample opportunity to file exceptions to her findings. But in this case, as in most comparative broadcast cases, the basic controversy does not center about disputed questions of fact but around the application of criteria and policies. The conclusions, in other words, were far more important than the findings of fact. And the Initial Decision did not contain conclusions--not after RAETA had dismissed its application.

To say that appellants were not prejudiced by this deficiency is to say that the requirements of the Administrative Procedure Act (5 U.S.C. §557) requiring conclusions as well as findings need not be observed in all cases, but only in some cases. In this case, appellants did not have an opportunity to file exceptions addressed to meaningful conclusions. This, clearly, was prejudicial. Otherwise, the right to file exceptions to conclusions is meaningless and unimportant. There is no warrant for this in the Administrative Procedure Act, or in its legislative history (assuming

that legislative history is significant when the statutory language is clear and unambiguous), or under any concept of due process or fundamental fairness with which appellants are familiar.

Appellee and intervenor have not succeeded in distinguishing Channel 16 of Rhode Island, Inc. v. FCC, 97 U.S. App. D.C. 179, 229 F.2d 520 (1956.) In that case, as in this, there was a lengthy hearing, a full opportunity to file proposed findings, and two oral arguments before the Commission. Moreover, the Commission's General Counsel made the same argument in that case that intervenor does here --that "appellant does not show that it was prejudiced by the alleged procedural omissions." (Case No. 12,537, in Volume 1056, Records & Briefs, United States Court of Appeals, D.C., Appellee Br., p. 4; see also pp. 6-7.) The Court was not impressed. It held that the lack of conclusions deprived appellant of an important right and required reversal. Appellants respectfully submit that the decision in this case must be the same.

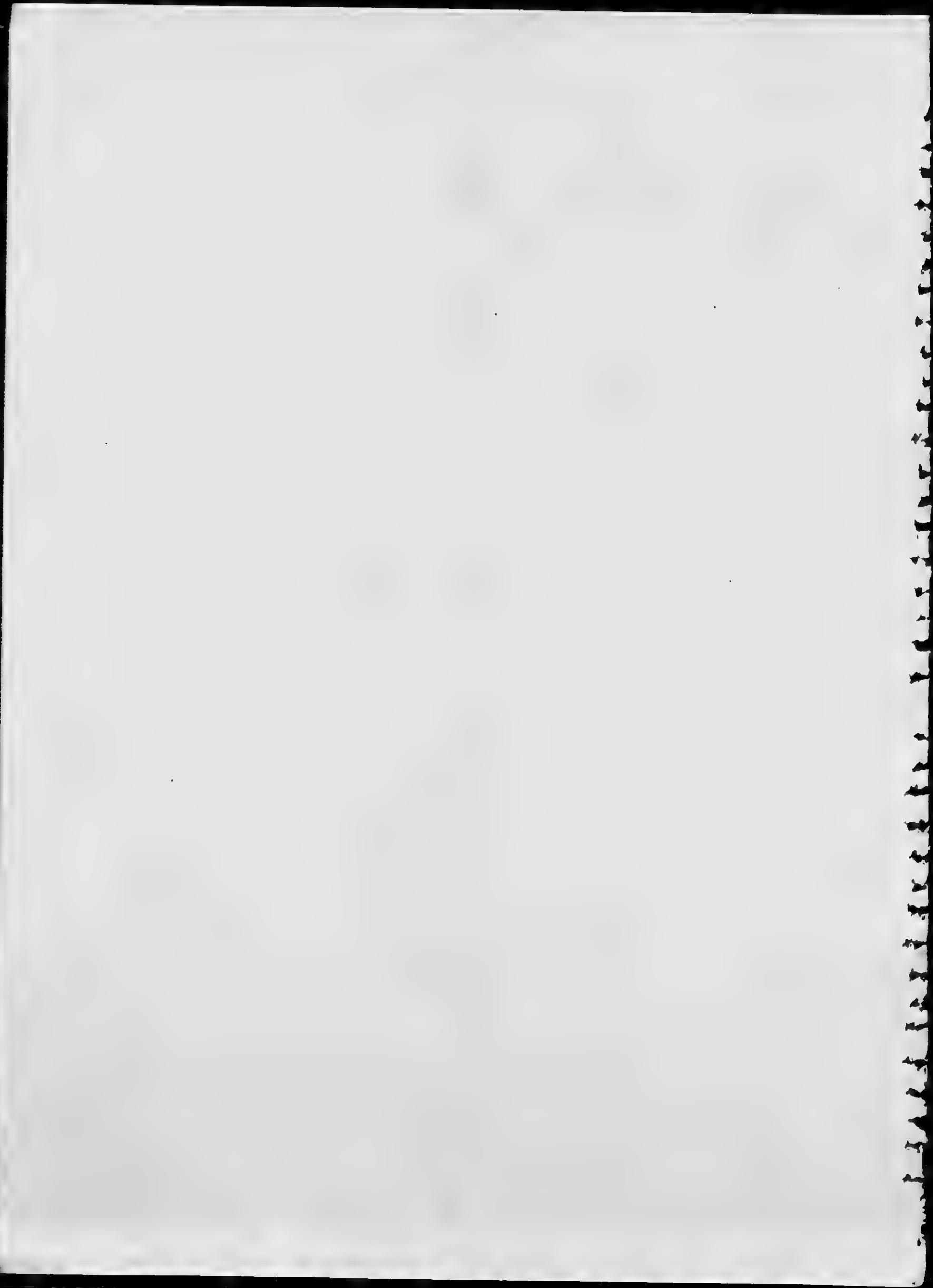
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BRIEF FOR INTERVENOR

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,277

STAR TELEVISION, INC.

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,544

HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC., Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,541

COMMUNITY BROADCASTING, INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,545

GENESEE VALLEY TELEVISION CO., INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,542

CITIZENS TELEVISION CORP.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,546

MAIN BROADCAST CO., INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,543

FEDERAL BROADCASTING SYSTEM, INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,547

ROCHESTER TELECASTERS, INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

ON APPEALS FROM A DECISION AND A MEMORANDUM OPINION  
AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals  
for the District of Columbia Circuit

FILED APR 19 1968

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QUESTIONS PRESENTED

As stated in the prehearing stipulation, Appellee Federal Communications Commission and Intervenor Flower City Television Corporation submit that the questions presented in the consolidated cases are as follows:

(1) Whether the Commission's findings and conclusions are:

- (a) supported by the evidence of record;
- (b) precluded by previous precedents and policy statements;
- (c) reasonable decisional judgments.

(2) Whether the proceedings which resulted in a grant to Flower City were procedurally defective in violation of Section 8 of the Administrative Procedure Act, 5 U.S.C. 557, in the following respects:

(a) In view of the dismissal of RAETA's application, was the Examiner's decision inadequate, thereby affecting the proposed findings, exceptions, and oral arguments?

(b) Did the Commission's decision inadequately state its findings and conclusions?

(c) Did the Commission improperly refuse to admit certain proffered evidence?

(d) Was the Commission required to adopt the suggestion of one or two of the applicants that it force or persuade all the applicants to merge?

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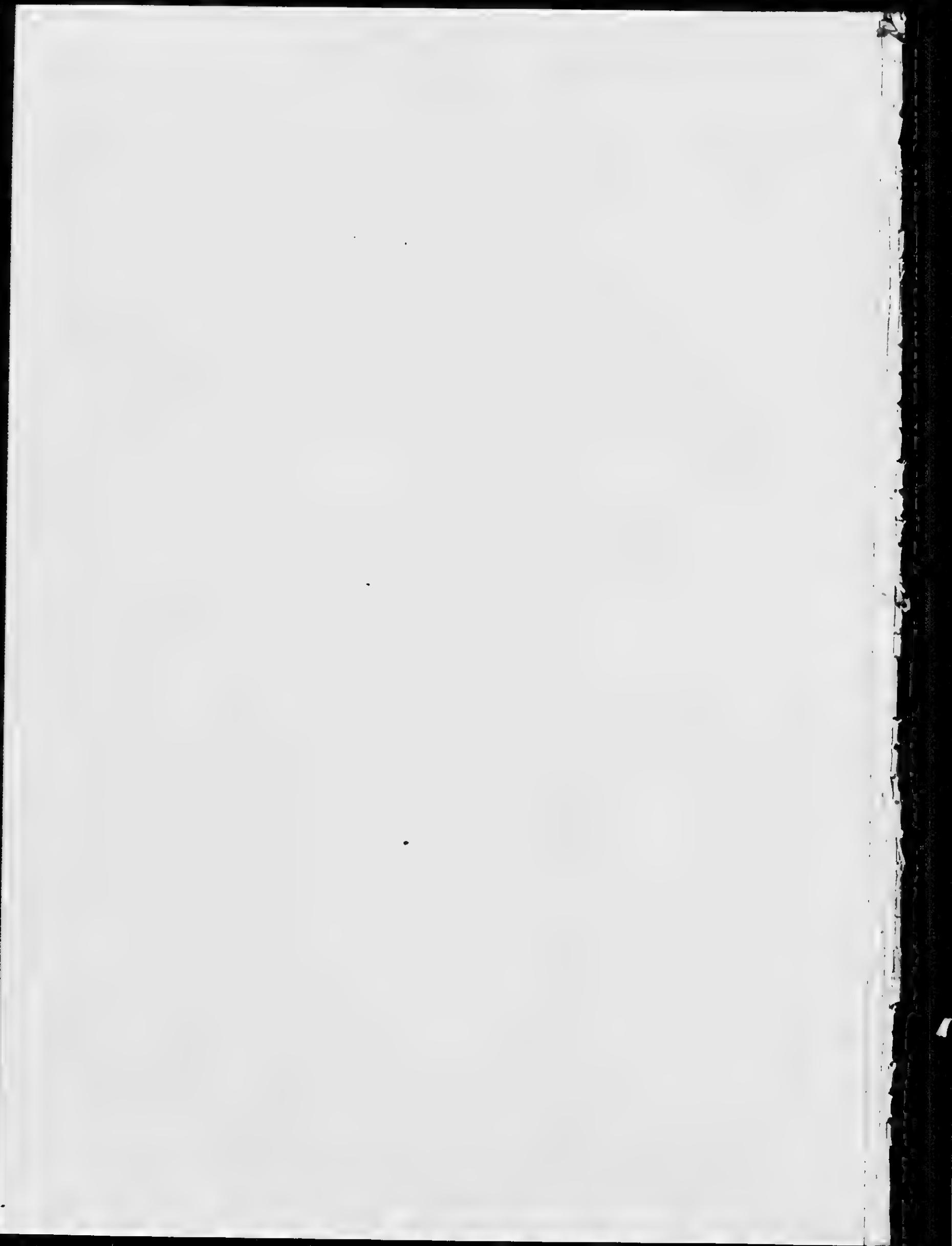
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\* Authorities chiefly relied upon are marked by asterisks.





IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,277

STAR TELEVISION, INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,544

HERITAGE RADIO AND TELEVISION BROAD-  
CASTING CO., INC., Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,541

COMMUNITY BROADCASTING, INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,545

GENESEE VALLEY TELEVISION CO., INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,542

CITIZENS TELEVISION CORP.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,546

MAIN BROADCAST CO., INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,543

FEDERAL BROADCASTING SYSTEM, INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

FLOWER CITY TELEVISION CORP.  
Intervenor

No. 21,547

ROCHESTER TELECASTERS, INC.  
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION  
Appellee

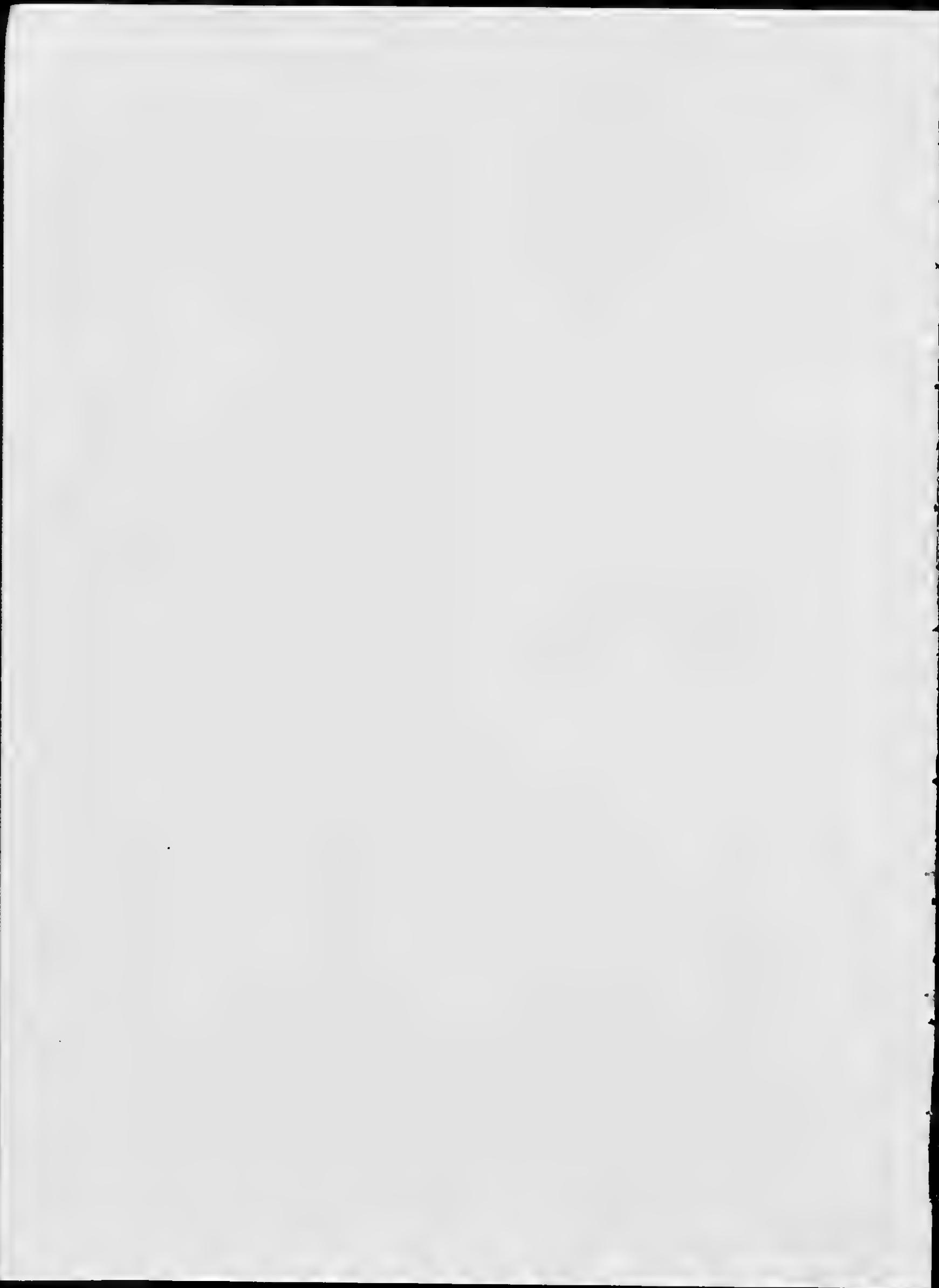
FLOWER CITY TELEVISION CORP.  
Intervenor

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ON APPEALS FROM A DECISION AND A MEMORANDUM OPINION  
AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR INTERVENOR



## COUNTERSTATEMENT OF THE CASE

This appeal involves the validity of the decision by the Federal Communications Commission (hereinafter Commission) in which it selected Intervenor Flower City Television Corporation (Flower City) over eight other mutually-exclusive applicants for a construction permit for a television broadcast station to operate on Channel 13 in Rochester, New York.

The competing applications <sup>1/</sup> were filed in September and October 1961 and on November 21, 1961 were designated for hearing before a Hearing Examiner. The hearing issues are set forth accurately in Appellants' brief (pp. 4-5). Following 70 days of hearing between June and December 1962, covering 71 volumes for a total of 9,692 transcript pages, and the filing in early 1963 of 2,000 pages of the applicants' proposed findings and conclusions, the Hearing Examiner issued an Initial Decision (I. D.) <sup>2/</sup> on January 22, 1964, in which she chose as a combined winner two of the applicants (RAETA and RTI) who proposed a share-time arrangement for using the channel. The 270-page Initial Decision included a distillation of the evidence in 694 numbered "Findings of Fact," organized under headings corresponding roughly to the headings dividing 66 numbered "Conclusions."

- 1/ Originally there were 12 applicants for the channel: the eight Appellants (each referred to in abbreviated form hereinafter), Intervenor Flower City, Rochester Area Educational Television Association, Inc. (RAETA), Rochester Broadcasting Corporation (RBC), and Ivy Broadcasting Company. The latter two parties did not prosecute their applications. See Initial Decision Prelim. Statement 1 & n. 1.
- 2/ The Hearing Examiner's Initial Decision and the Commission Decision of Aug. 3, 1967 are sometimes hereinafter cited I. D. and Dec., respectively. Findings, conclusions and exceptions are sometimes hereinafter cited as F., Concl., and Except., respectively.

The Examiner's conclusions covered the television needs and services in the Rochester area; the area familiarity of each of the applicant's principals; the integration of ownership and management proposed by each applicant; the broadcast experience of each applicant's principals; the extent of diversification of control of mass media of communication as it related to each applicant; the past broadcast record of each applicant; the efforts of the applicants to determine broadcasting needs and to plan programs accordingly, as well as their proposed programming; and other comparative matters. The Examiner resolved each of several "basic qualification" issues in favor of the applicant which had been challenged and then, upon a comparative evaluation of the applicants on the several criteria above-mentioned, she reached an overall preference for the complementary RAETA-RTI share-time applications.

The applicants filed exceptions to the Initial Decision. Each of the Appellants and Intervenor provided its own evaluation of the other applicants under the applicable criteria and urged that it was comparatively superior to all the other applicants.<sup>3/</sup> These written submissions to the Commission were followed by oral argument before the Commission en banc on November 2, 1964, at which time the parties again addressed themselves to the respective comparative merits of the several applications. Neither in their written

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3/ See e.g., the following Exceptions, Reply to or Briefs in Support of Exceptions filed with the Commission, as indicated: Community (Except. pp. 97-105), Heritage (Except. No. 59), Genesee (Br. pp. 6-7), Star (Br. pp. 34-37), Main (Br. pp. 13-15), Federal (Br. pp. 10-11), Citizens (Br. pp. 4-14), Flower City (Br. pp. 35-36), and RTI (Reply pp. 14-15).

submissions nor at this oral argument did any of the Appellants suggest that the Initial Decision was invalid because of the manner in which the Hearing Examiner evaluated the several applicants.

After hearing oral argument, the Commission concluded that the existing record did not contain sufficient evidence to determine whether alternative means were available for broadcast of the type of educational programming proposed by RAETA, and whether a part-time applicant such as RTI would provide an effective competitive outlet for a third network service (as all of the applicants proposed to provide). <sup>4/</sup> Accordingly, the record was re-opened to adduce further evidence on these issues. At the same time, the Commission indicated that each applicant would be permitted to modify its programming proposal to reflect the evolving needs of Rochester. (FCC 65-403, released May 13, 1965.)

Following this remand to a hearing examiner, the parties entered into negotiations with RAETA, as a result of which RAETA requested and on January 21, 1966 obtained approval of the dismissal of its application, having received from the other parties reimbursement for its expenses (2 F. C. C. 2d 448 and 1029 (1966)). Subsequently, RAETA commenced operation of full-time educational station WXXI on UHF channel 21 in Rochester.

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4/ The American Broadcasting Company had filed an amicus curiae brief in which it argued that ABC would be at a competitive disadvantage with the other major networks, which already had affiliate television stations in Rochester, if the channel here in question were assigned to a share-time commercial station - RTI - as recommended by the Examiner.

In an order released April 21, 1966 (FCC 66-347), the Commission set aside the above-mentioned remand order on the ground that no useful purpose would be served by further hearing on the matters specified, in view of RAETA's withdrawal and the Commission's adoption of the Policy Statement on Comparative Broadcast Hearings, 1 F. C. C. 2d 393 (1965), the latter having established guidelines for Commission consideration of planning, preparation and proposed programming in comparative hearings. The April 21, 1966 order recited that it appeared to the Commission

"that all matters of decisional significance in this proceeding are in the present record, that further hearings would serve no useful purpose and that it would be more conducive to the Commission's orderly processes for the Commission to decide this proceeding on the basis of the present record . . . ."

None of the applicants made any objection to this order of the Commission setting aside its earlier remand order. Nor did any of them make any move to supplement the record or the Initial Decision. Previously, on November 29, 1965, RTI had requested leave to amend its application to specify full-time operation and to alter its financial proposal.

In a joint Petition for Prompt Resolution of Case, filed with the Commission on March 2, 1967, Flower City, Citizens, Community and Star urged that the Commission avoid further delay in reaching a final decision. They pointed out that the public interest was not being served adequately through the interim corporation (see Appellants' Br. 4 n. 1), which has been operating

on the channel since 1962. Those four parties contended that the Commission should bring the comparative proceeding "to an early and prompt conclusion," and stated that:

"Presently, there are no known obstacles in the way of an early resolution of the case. However, if further time is permitted to elapse, there may occur death or disability on the part of major principals of applicants, thereby altering bases for comparisons of the applicants and requiring additional hearings."

After suggesting a procedure for the Commission to name a few of the applicants as the leading contenders for the license grant (with the hope that the leaders would then merge their interests), the petition stated:

"If the procedure is not adopted, petitioners call upon the Commission to resolve this case at the earliest possible time by the usual method of issuing a final decision selecting a single winning applicant. \* \* \* The Congressional mandate /in the Administrative Procedure Act/ calls for action now."

In a "Joint Response to Petition for Prompt Resolution of Case" filed on March 27, 1967 by Federal, Heritage and Main, those three applicants opposed the suggested merger procedure, stating that:

"The role of the Commission is to select the licensee who will best operate the station in the public interest. Unless all applicants and the Commission agree to another procedure that can be done only by selecting the best qualified applicant based upon the evidence of record . . . the Hearing Examiner issued an initial decision in accordance with this established, traditional course, and no legal or other considerations have been advanced by Petitioners as justification for their novel 'solution.'

\* \* \*

"Respondents subscribe to Petitioners' request of the Commission that there be a prompt resolution of the case. Protracted further proceedings in this case are obviously undesirable . . ."

On the Commission's own motion, further oral argument was heard on May 22, 1967. Heritage and Main alone - and for the first time in the proceeding expressed the opinion that the Commission could not legally decide the case without further hearing and a supplementary initial decision. They argued that there was no valid initial decision and that the withdrawal of RAETA left its proposed sharer-of-time RTI with an application that must be amended and re-tested through cross-examination (Tr. 9910-13, 9918-22, 9983-85, 9992). Only Star agreed even in part with Heritage and Main, stating that if proposed programming were to be considered as being in issue, then a full-time programming proposal of the previously part-time applicant RTI should be tested by cross-examination (Tr. 9970-72). The other five Appellants and Intervenor Flower City unequivocally opposed any further delay of a final choice among the applicants (Tr. 9897, 9980 (Community); 9929-30, 9933-36, 9938-39 (Federal); 9956 (RTI); 9958 (Flower City); 9964-66 (Genesee); 9990-91 (Citizens)).

On August 3, 1967, the Commission adopted the Decision which is the subject of this appeal. After outlining the procedural history of the case, the Decision, prior to a detailed comparative evaluation of the applicants, covered the following matters:

(a) It stated that "each of the applicants has met its obligations" in respect to being familiar with and ascertaining the needs and interests of the area to be served; and that "variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs" (par. 3).

(b) It held that the evidentiary showings of RAETA's specialized programming submitted pursuant to a subissue concerning unfulfilled programming needs - added upon RAETA's petition for enlargement - was mooted by the dismissal of RAETA's application and the subsequent commencement of operations of educational station WXXI (par. 3 n. 3). See Appellants' Br. 4-5 (subissue (d)).

(c) It held that the Examiner's findings of fact were substantially accurate and complete, and they were adopted with modifications noted in the Decision and in an appendix of rulings on every exception noted by the parties. Because of the withdrawal of RAETA, the Commission stated that "the findings in this proceeding now warrant substantially different conclusions and a different ultimate result" (par. 5).

(d) Pending petitions for leave to amend the applications of Flower City, Star and Heritage to reflect changes regarding certain principals were granted (par. 6(a), (b), (d)). Community and Flower City had notified the Commission of changes regarding certain principals, and these facts were noted (par. 6(c) & n. 5). Also, upon reconsideration of a previously denied petition for leave to amend, RTI was permitted to specify full-time operation without otherwise altering its comparative qualifications (par. 6(e)).

The Commission in its Decision then undertook an evaluation of the applicants on the basis of several traditional comparative criteria: diversification of the media of mass communication, participation in station operation by owners (otherwise known as integration of ownership with management)

and past broadcast record, as well as other criteria which were deemed not critical to the final choice by the Commission (par. 7, 8, 10-12). No preference was awarded on proposed program service (preparation, staffing, program policies and proposals) because the Commission concluded that all the applicants had met their obligations in this respect and ordinary differences in judgment would not be compared (par. 9; see par. 3).

In its final weighing of preferences and demerits, the Commission stated:

"13. We believe that the public interest would best be served by a grant to Flower. We conclude that no preferences are warranted with respect to the proposed program services and the efficient use of this television channel . . . We find no significant difference among the applicants on diversification of control of mass communications media, except that, as pointed out above, Federal has other broadcast interests, including station WSAY in Rochester. The other important factors involved in this case are participation in station operation by owners and past record. On participation we have preferred Federal with Flower second, and on past record have given a preference to Community above all of the other applicants. We believe that Flower is to be preferred to Federal because of Federal's existing broadcast interests; we feel that the public's interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This superiority arises from the experience factor. (We note that Community's participating stockholders also lack area familiarity.) We feel that Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community, itself, but rather of a 15-per cent stockholder (and proposed general manager) who was a 50 per cent owner of the station whose record is involved. For the foregoing reasons we have determined to make the grant to Flower."

Commissioners Bartley and Johnson dissented in separate statements. Commissioner Bartley differed with the majority on the significance to the public interest of single ownership of AM-FM-TV broadcast stations in the same city. Thus, he would have assessed against Federal only a "slight" demerit on the factor of diversification of control, and he would have awarded it the overall preference by virtue of its superiority on the ownership-management integration factor. 9 F.C.C. at 260-61. Commissioner Johnson, on the other hand, agreed with the majority that Federal suffered a "substantial" detriment because of its ownership of other broadcast stations in the Rochester area. He stated, however, that while the Commission's choice of Flower City is "quite satisfactory," and his own preference is "not a strong one,"

"Forced to vote for one of these nine applicants, I would choose Community Broadcasting, Inc. Community ranks well down the list in the integration factor. But, as the Commission notes, it deserves a preference for its past broadcast record." 9 F.C.C. at 262-63.

Neither of the dissenting Commissioners challenged the legality of the Commission's choice or manner of choice.

All of the unsuccessful applicants other than Star filed petitions for reconsideration, arguing both procedural and comparative evaluation errors. In a Memorandum Opinion and Order adopted November 22, 1967 (10 F.C.C. 718)(hereinafter Reconsideration), the Commission, by a 4-2 vote, adhered to its evaluation of the applicants under the comparative criteria (par. 2-4). It also explained why it believed the Initial Decision "complies with all of the requirements of the Administrative Procedure Act and of our Regulations"

(par. 5-7). The Commission observed that "/i/n other respects the petitions for reconsideration . . . are substantially devoted to a further analysis of the reasons why each petitioner's application should be granted" (par. 7-8). 5/ It reiterated its reasons for preferring Flower City over the other applicants, to wit:

"2. In our Decision, we held that each of the other applicants must be given a substantial preference over Federal with respect to the diversification of control of the media of mass communications criterion due to Federal's connection with Stations WSAY, Rochester, and WNIA, Cheektowaga, New York. Federal was given a substantial preference over all of the other applicants for its participation in station operation by owners because of the fulltime integration of its 100% owner, Gordon P. Brown, but Flower was preferred over all remaining applicants in view of the extensive broadcasting, and particularly television, experience of G. Bennett Larson, and the somewhat lesser broadcast experience of Gordon Auchincloss, II. While some other applicants had greater degrees of integrated local residence, we noted that the significance of the absence of past local residence by Flower's two fully integrated stockholders was diminished by the facts that the great majority of its stockholders will devote some time to the operation of the station. We also held that Community was entitled to a preference over all of the other applicants for the commendable past broadcast record of Station WHAM, Rochester, when Community's 15% stockholder, F. Robert Greene, was 50% owner and general manager of that station.

"3. In conclusion, we stated that Flower was preferred over Federal since the public interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We also preferred Flower over Community, whose integrated stockholders also lack area

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5/ The Commission denied as untimely and unfair a post-Decision petition by Citizens for leave to amend its application regarding the management participation by one of its stockholders (par. 7 n. 2). The Commission also explained that Community had been given no credit in the Decision for a late-filed promise of greater participation by one of its stockholders (ibid. ).

familiarity, because of the former's superiority, arising from the experience factor, in the area of participation in station operation by owners. While Community's past broadcast record was commendable, we held that it was not so outstanding as to warrant substantial weight, since it was not the past record of Community, itself, but rather that of its 15% stockholder and proposed general manager. Thus, we concluded that the public interest would best be served by a grant to Flower."

Finally, the Commission stated (par. 8):

"While we concluded that Flower's application should be granted only after exhaustive consideration of this record and through analysis of the comparative qualifications of each of the applicants, we have again reviewed our Decision in light of the petitioners' present contentions and we are convinced that they have presented no reason which warrants a departure from the findings and conclusions contained in that Decision. Under these circumstances, we remain convinced that the public interest will be best served by a grant of Flower's application and, thus, the petitions for reconsideration of that determination must be denied."

In a short dissenting statement, Commissioner Bartley said he would still favor a grant to Federal. Commissioner Johnson dissented without statement.

These appeals followed.

#### STATUTES INVOLVED

5 U.S.C. § 557 (Administrative Procedure Act) and Section 409 (a) & (b) of the Communications Act of 1934, as amended, 47 U.S.C. § 409 (a) & (b), are set forth in an appendix to Appellants' brief.

In addition, 5 U.S.C. § 706 (Administrative Procedure Act) states in part:

"In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

## SUMMARY OF ARGUMENT

### I.

The Commission's ultimate findings and conclusions, read in conjunction with its adopted findings of fact and its rulings upon the parties' exceptions, are an adequate articulation of reasons for the overall preference of Flower City over all other applicants.

Opinions of the Supreme Court and this Court have held that the Administrative Procedure Act requirement of a reasoned decision (5 U.S.C. § 557) must be given a reasonable interpretation; that only the major contentions of parties need be specifically answered; that the agency's findings of fact need not be annotated to more ultimate findings if those ultimate findings appear as rational inferences from the basic facts; and that, in any event, the burden is on the party asserting error to show that he was prejudiced by such error. When judged by these principles, Appellants' several objections regarding the Commission's statements on the stockholder participation factor are seen to be inconsequential.

Much of Appellants' argument is really a re-argument of many substantive and procedural matters on which the Commission has been granted wide discretion in acting and on which the Commission has in fact acted in a reasonable manner.

II.

The Commission considered the evidence adduced concerning the applicants' ascertainment of programming needs and their proposals for meeting those needs, and it properly concluded that there were no significant differences among the applicants on these subissues. Contrary to Appellants' statement, the Commission did not find that a special needs subissue had been mooted, and in fact considered the evidence adduced thereunder with respect to the programming of all applicants except one, which dismissed its application.

The Commission's conclusion of no significant differences between the remaining parties was an application of previously announced Commission policy. It was a reasonable inference from the findings of fact adopted by the Commission. It was consistent with the Hearing Examiner's Initial Decision. And it was accompanied by rulings on pertinent exceptions filed by the applicants. Thus the Commission did not err in omitting from its decision a particularized comparison of the applicants on preparation and proposed programming.

The findings of fact adopted by the Commission, and the coincidental denial of the pertinent exceptions thereto, expressly resolved allegations of unpreparedness in favor of Flower City and also showed that the Commission had considered and rejected claims of superiority in the programming area, as made by Star and other Appellants.

III.

Contrary to Appellants' contention, the Commission did not violate its Policy Statement on Comparative Broadcast Hearings by giving Flower City a preference, under the integration of ownership with management factor, for the local residence of shareholders who would participate only part-time in the management of Flower City. The Commission clearly indicated that it considered this proposed participation for the limited purpose of evaluating the significance of an absence of such past local residence by the proposed full-time participating shareholders in Flower City. The Policy Statement did not address itself to this situation, but rather was concerned with the degree of affirmative preference due for part-time participation.

Further, in light of Commission consideration of both the past and prospective local residence of all shareholders of Flower City (and similar consideration of all shareholders of other applicants), it is not correct, as alleged by Appellants, that the Commission neglected local residence by giving undue weight to the broadcast experience of Flower City's full-time shareholder-participants.

In any case, the Commission fully explained the bases for its choice of Flower City on this factor, and to the extent there were any slight departures from the details of the Policy Statement, they were expressly contemplated by members of the Commission at the time of the adoption of that statement.

IV.

The Commission fully and fairly considered all other significant matters raised in Part IV of Appellants' brief.

Federal's last-minute, informal, indefinite and self-serving attempt to record a willingness to divest itself of Rochester and Cheektowaga, New York radio stations required no action by the Commission.

Contrary to Appellant's assertion, the Commission expressly considered the acquisition of a 5% interest in a San Jose, California radio station by a Flower City shareholder and held that, because of the small interest involved and the distance of the station from Rochester, no significant weight would be accorded to this interest.

Appellant RTI was permitted to alter its comparative qualifications but only to the extent that they were necessarily altered by RTI's specification of full-time operation. RTI's disadvantageous position following the withdrawal of its share-time complement RAETA was a risk which RTI voluntarily assumed, and the Commission was not obliged to permit RTI to reconstruct its application after hearing. Certainly the other Appellants were not hurt by RTI's weaknesses, and thus they cannot justly complain.

Since Heritage's principal Birnbaum was not only its president but also its chief executive and financial officer and director, it was clearly within the Commission's discretion to find that his involvement in the filing of a false registration statement with the Securities and Exchange Commission was a substantial reflection on his and Heritage's qualifications.

The Commission provided the parties ample opportunity to reach agreement on a merger proposal. It had no duty beyond that, and a remand for further merger discussions at this time would be contrary to the public interest.

V.

The Initial Decision by the hearing examiner satisfied both the letter and the spirit of the Administrative Procedure Act, 5 U.S.C. § 557(c).

Appellants cite no authority for the proposition that mutually exclusive applicants must be given a seriatim ranking vis-a-vis each other as well as the winner in the initial decision. Commission practice has often been otherwise. In this proceeding, the examiner applied the comparative criteria to each of the applicants in order to state her conclusions expressed in groupings of applicants.

The post-initial decision withdrawal of RTI's sharer-of-time applicant RAETA did not undermine the validity or purpose of the initial decision. Each of the present applicants with the exception of RTI (which voluntarily chose to rise or fall with RAETA) filed exceptions claiming its superiority to each and every other applicant. Nor did the RAETA withdrawal deprive the initial decision (favoring RAETA-RTI) of "an essential attribute" of potential finality, as claimed by Appellants, since the filing of exceptions by the applicants had, ipso facto, already deprived the initial decision of that attribute.

Legislative history and case law establishes that the most essential part of an initial decision is not its conclusions, as Appellants contend, but rather those findings which determine the credibility of witnesses. Appellants have not alleged that the withdrawal of RAETA affected any credibility questions in this proceeding.

Further, Appellants waived objection to the initial decision, and affirmatively encouraged the Commission to resolve the case promptly following the May 1967 oral argument. At the least, the tardiness of Appellants' objections is a recognition that they were not prejudiced by the alleged procedural error. Appellants have not met their burden of proving such prejudice.

#### ARGUMENT

##### Preliminary Statement

After more than six years of contest among the applicants, the losing parties in the Rochester Channel 13 proceeding now combine in an appeal to the Court to dethrone the winner. "The Commission thus is substituted as a common target of those parties whose acrimony had previously been spent upon each other." <sup>6/</sup> In their joint brief, the eight Appellants seemingly embrace every point that was raised below by any one of them, although most of them took positions in active opposition to the point during proceedings before the Commission. Few of the many errors alleged by Appellants

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<sup>6/</sup> Massachusetts Bay Telecasters, Inc. v. FCC, 104 U.S. App. D.C. 226, 232, 261 F.2d 55, 61 (1958).

go to the essence of the Commission's highly discretionary comparison of the applicants. On the contrary, as we shall demonstrate hereinafter, most of the alleged errors deal with matters of form in which Appellants for the most part acquiesced. It will be apparent, we submit, that Appellants have been given more than adequate opportunity by the Commission to present and argue their respective versions of the facts and conclusions.

It will also become apparent to the Court that except for the single novel but unsubstantial argument concerning the adequacy of the Initial Decision, these are "garden variety" appeals by the losers in a comparative television hearing in which the alleged grievances basically are that the Commission failed to make proper inferences of ultimate facts from the findings of basic facts; applied comparative criteria arbitrarily; and did not sufficiently articulate the reasons for preferring Flower City over the other applicants. This Court, appreciating that decisions in these comparative television cases involve basically matters of judgment entrusted by Congress to the Commission, has consistently refused to reverse Commission decisions in which similar alleged grounds for appeal were asserted, unless the Commission had failed to afford the applicants a full and fair comparative hearing or acted arbitrarily in making its selection. Pinellas Broadcasting Co. v. FCC, 97 U.S. App. D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007 (1956). See also Florida Gulf Coast Broadcasters, Inc. v. FCC, 122 U.S. App. D.C. 250, 352 F.2d 726 (1965); McClatchy Broadcasting Co. v. FCC, 99 U.S. App. D.C. 195, 239 F.2d 15 (1956), cert. denied, 353 U.S. 918 (1957); Scripps-Howard Radio, Inc. v. FCC, 89 U.S. App. D.C. 13, 189 F.2d 677, 680, cert. denied, 342 U.S. 830 (1951).

There was indeed a full and comparative hearing in this case. The Initial Decision of the Hearing Examiner spelled out in exhaustive detail the background, experience and proposals of each of the applicants. Extensive exceptions were filed by the parties proposing corrections and additions to those findings. After reviewing the findings in the light of the exceptions, the Commission found that they were substantially accurate and complete, and accordingly adopted them with such additions and modifications as are contained in the rulings on the exceptions and in the Commission opinion itself. In view of the history of the long proceedings below, the multiplicity of pleadings and the many opportunities availed of by the parties to file exceptions to the Initial Decision, to engage in oral argument before the Commission en banc, to obtain rulings on the exceptions and to urge reconsideration of the decision and rulings, the present claim of procedural deficiency is plainly insubstantial.

The judgment of the Commission, reached on a full record after a prolonged comparative hearing, was that on balance Flower City was to be preferred. As is true in practically all these comparative television cases, there is room for disagreement as to the respective weight to be attached to various criteria of selection. But even Appellants must, and apparently do, recognize that Flower City is well qualified to operate the station in question. The Commission decided to award the grant to this applicant over Federal under the important factor of diversification of media because Federal, unlike Flower City, had other broadcast interests in the Rochester area and over the other applicants primarily because of the assurance of better performance that it derived from the fact

that Flower City proposed full-time day-to-day participation in operation by owners with substantial stock interests who also had wide experience in the field of television and radio broadcasting. It also pointed out that while these professional owner-managers would be new residents of Rochester, this factor was not controlling, especially since the great majority of the other stockholders, who will devote varying amounts of time to the station, are long-time residents of Rochester. This decision, we submit, represents a proper exercise of judgment by the administrative agency, after a weighing of the collective facts concerning all the applicants, and it should not be disturbed by the Court.

I. THE COMMISSION'S EVALUATION OF THE APPLICANTS  
UNDER THE CRITERION "PARTICIPATION IN STATION  
OPERATION BY OWNERS" WAS REASONABLE AND WAS  
ADEQUATELY ARTICULATED

Appellants complain (Br. 37) that the Commission "did not rule on their individual claims for preferences for their integration of ownership and management/proposals," and "did not deal with their specific contentions regarding Flower's proposed integration" (p. 37). Their contentions are wholly without merit.

Intervenor does not dispute the principles quoted by Appellants from opinions which they cite. Unlike the decision now under review, the agency decisions involved in the cited cases either contained little or no explanation of an ultimate finding or failed to give any answer to a major contention of a party. For example, in Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167 (1962), the Court stated: "There are no findings and no analyses here

to justify the choice made . . ." (emphasis added). And in Greensboro-High Point Airport Authority v. CAB, 97 U.S. App. D.C. 358, 362, 231 F.2d 517, 521 (1956), this Court dealt with the fact that there was no answer to a party's major charge - that Greensboro-High Point had been unfairly discriminated against by the agency.

The Greensboro-High Point case recognizes a rule-of-reason for determining an agency's compliance with the requirement of the Administrative Procedure Act for a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record" (5 U.S.C. § 557). The Court stated (97 U.S. App. D.C. at 361-62, 231 F.2d at 520-21):

" \* \* \* Those requirements must, of course, receive a reasonable interpretation, in the light of the circumstances of the individual case. Under Section 10 of the Administrative Procedure Act, the courts are empowered to set aside agency action which is 'without observance of procedure required by law,' but only after taking 'due account \* \* \* of the rule of prejudicial error.' 5 U.S.C. § 1009(e) [now 5 U.S.C. § 706]. The agency's findings must also be sufficiently definite to enable the courts to perform the task of judicial review."

The Commission's Decision - and specifically that portion of it titled "Participation in Station Operation by Owners" - not only meets this test but also that of Johnston Broadcasting Co. v. FCC, 85 U.S. App. D.C. 40, 46, 175 F.2d 351, 357 (1949). The interpretation which the Johnston test received in Scripps-Howard Radio, Inc. v. FCC, 89 U.S. App. D.C. 13, 16-17, 189 F.2d 677, 680-81, cert. denied, 342 U.S. 830 (1951), is particularly pertinent. In the latter case, the Court stated (emphasis added):

"\* \* \* There is no question as to the range of the basic findings. Appellant does press, however, that the Commission both failed to make comparative or ultimate findings as to the points of difference shown by the basic findings, and refused to grant or deny each of the comparative findings which it requested. As to the latter point, it is clear that if the comparisons made are adequate, failure to make others requested is immaterial. The parties may not control the exact form or content of a decision.

"As to the question whether adequate comparative findings were made, Johnston Broadcasting Co. v. Federal Communications Commission, *supra*, . . . sets forth certain requirements which cover this and other points. Each of these was met. As we subsequently point out, the reason for the final conclusion in favor of the Cleveland Company is clearly stated; this conclusion is a rational one from the basic findings; the latter are quite sufficient in number and substance to support the conclusion; the ultimate facts are rational inferences from the basic factual findings; and the latter find substantial support in the evidence under the rule as recently stated by the Supreme Court in Universal Camera Corp. v. N. L. R. B., 1951, . . . The final conclusion is shown clearly enough to have been reached upon a composite consideration of the findings indicating the differences. In sum, the principles set forth in Johnston Broadcasting Co. v. Federal Communications Commission, *supra*, were followed in all material and substantial respects."

It has been clearly held that the Administrative Procedure Act does not require the agency to rule upon exceptions to the examiner's report "point by point," with a "specific, separate ruling on each exception"; and the agency may adopt the examiner's report as its own. Division 1142, Amalgamated Ass'n of Street Electric Ry. & Motor Coach Employees v. NLRB, 111 U. S. App. D. C. 68, 72, 294 F. 2d 264, 268 (1961); NLRB v. Wichita Television Corp., 277 F. 2d 579, 585 (10th Cir.), cert. denied, 364 U. S. 871 (1960). In Radio Station KFH Co. v. FCC, 101 U. S. App. D. C. 164, 166, 247 F. 2d 570, 572 (1957), the Court, responding to the Administrative Procedure Act provision here relied upon (now 5 U. S. C. § 557), remanded the case because the Commission's

"statement of reasons comes to little more than this: For one reason or another, all the exceptions not granted are overruled." The Court stated its requirement:

"Although a specific ruling on each minor exception is not indispensable, the parties and the court should not be left to guess, with respect to any material issue, or to any group of minor matters that may have cumulative significance, which of several alternatives the Commission had in mind. It should make the basis of its action reasonably clear." (Emphasis added.)

The Court referred to another of its opinions thusly:

"The record in Colonial Television, Inc. v. Federal Communications Commission showed, although this court's opinion did not, that the Commission made its position clear on all the appellant's major contentions. We found that there was no 'denial of procedural due process' . . . ." (Emphasis added.)

There would appear to be little utility in a requirement that the agency repeat all of the parties' contentions before concluding that the facts upon which it rests for support of its conclusion are the controlling ones. Nor is there a scale in which the Court can place these facts for the purpose of determining whether the Commission properly weighed them. As the Supreme Court stated in NLRB v. Seven-Up Bottling Co., 344 U. S. 344, 348 (1953):

"It is not for us to weigh these or countervailing considerations. Nor should we require the Board to make a quantitative appraisal of the relevant factors, assuming the unlikely, that such an appraisal is feasible. As is true of many comparable judgments by those who are steeped in the actual workings of these specialized matters, the Board's conclusions may 'express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions \* \* \*'; and they are none the worst for it. \* \* \* It is as true of the Labor Board as it was of the agency in the Babcock case that 'the board was created for the purpose of using its judgment and its knowledge.' *Ibid.*"

Similarly, in Baltimore & Ohio Railroad Co. v. United States, 298 U. S. 349, 359 (1936), the Court stated:

"There is no requirement that the Commission specify the weight given to any item of evidence or fact or disclose mental operations by which its decisions are reached. Usual precision in respect of either would be impossible. And it would be futile upon the record to attempt definitely to ascertain the weight assigned to any fact or argument in prescribing the divisions."

The determination of whether the integration of ownership and management of one applicant is more meaningful than that of another applicant is basically one of administrative expertise and judgment. It would be a pedantic exercise for the Commission to "annotate" to each ultimate finding the basic facts supporting that finding. Cf. United States v. Pierce Auto Freight Lines, Inc., 327 U. S. 515, 529 (1946). It is enough that the detail of differences among the applicants is reflected in the Commission's express adoption of separately stated findings of basic facts in the Initial Decision, accompanied by a summarization of the significant distinctions among the applicants and by rulings on exceptions to the findings in the Initial Decision, as was done in this proceeding. Those findings and rulings and the opinion of the Commission provide adequate means for the Court to review the reasonableness of the ultimate facts and conclusions of the Commission and to assure itself that no major significant difference or contention was ignored by the Commission in its choice of a winner.

The main thrust of Appellants' brief (pp. 45-46) is that the Commission failed to articulate adequately its reasons for preferring Flower City and that, therefore, the Court is left to speculate as to how the Commission disposed of various "facts" and contentions advanced by Appellants. An examination of the

questions they raise will show that they were either adequately discussed or otherwise clearly passed upon, or were of such a nature as not to warrant separate, explicit treatment by the Commission.

For example, Appellants pose the question as to whether or not the Commission concluded that Larson's pre-1959 television experience was more impressive than Fraiberg's current and continuing experience, and, if so, what consideration it gave to the changes in television that have occurred since 1959. Their contention of error on the part of the Commission is untenable on several grounds. Firstly, it is grounded upon the false assumption that the Commission was required to rank Larson of Flower City individually in a comparison with Fraiberg of Citizens and with the proposed general manager of each of the other applicants. The Commission, however, compared all full-time stockholder-participants - in Flower City's case, both Larson and the proposed program director Auchincloss - and also took into account other collective features of the respective applicants. In context, the Commission's preference of Flower City for the contributions of Larson and Auchincloss as full-time stockholder-managers as compared with those of each of the other applicants' combined full-time stockholder-managers is a rational inference from the findings of basic facts adopted by the Commission. See Scripps-Howard Radio, Inc. v. FCC, supra; Johnston Broadcasting Co. v. FCC, supra.

This contention of Appellants also relies in part upon the erroneous assumption that the Commission was required to give weight to Fraiberg's most recent experience. It should be noted that Fraiberg's management of WNEW-TV in New York is not a part of the record evidence upon which the Commission decided the proceeding, and there was no requirement that the Commission take official notice of this fact, either from a fleeting statement (not even a request for official notice) at oral argument (Tr. 9943) or upon reconsideration of its Decision, especially when to do so might have deprived the other parties of appropriate cross-examination on the point and similar updating of their applications. <sup>7/</sup> Obviously the Commission may set reasonable time limits to the receipt of evidence and reject self-serving evidence offered beyond that time.

Moreover, the Commission was obviously not impressed by the argument of Fraiberg's superiority over Larson. It rejected this argument in denying Citizens' exceptions 60(i) and 61(b) (see appendix to Decision). The Commission, which adopted detailed findings on the broadcast experience of the applicants, need not explain in so many words that the weight which it accorded to Larson's extensive past television experience was not materially affected by the fact that changes in the industry have occurred, as it obviously recognizes. The nine parties made scores of minor arguments concerning the proper inferences to be drawn from the facts, and it would be unreasonable to expect the Commission

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<sup>7/</sup> By way of contrast, all of the post-Initial Decision application amendments granted by the Commission were either unopposed or did not reflect favorably upon the applicant in the comparative evaluation. See Dec., par. 6; Re-consideration, par. 7 n. 2.

to answer each of them in detail merely to show that it has in fact considered each of them. Furthermore, the changes-in-the-industry argument was not articulated as such until after the Commission Decision, when Citizens made it in its petition for reconsideration (pp. 8-10). In its exceptions 60(i) and 61(b) and brief in support thereof (pp. 28, 32), Citizens had merely proposed conclusions that Larson had not been a station general manager since 1959 (although he had continued thereafter in another part of the industry) and that, therefore, his management experience was not "as current" as Fraiberg's. The Commission was not obliged to advert specifically to the similar but more detailed argument made by Citizens in its petition for reconsideration, which was clearly an untimely effort under the circumstances.

Appellants also raise a question as to the Commission's reference to Community's full-time stockholders as lacking area familiarity. At first blush, this may seem inconsistent with the finding that Greene of Community was previously connected with Rochester AM and FM radio stations. The Commission obviously was aware of this fact, having credited Community under the criterion "Past Broadcast Record" for Greene's broadcast activities in Rochester in 1956-59 (Dec., par. 11). But the purpose for which the term "area familiarity" was used at this point was to compare Flower City and Community under the integration factor in the light of the Policy Statement on Comparative Broadcast Hearings, 1 F. C. C. 2d 393, 395-96 (1965), and to determine whether the absence of past local residency by Flower City's full-time participating stockholders was significant. In that context, the statement that Community's full-time stockholders

"also lack area familiarity" referred, as in the case of Flower City, to the absence of the kind of familiarity derived specifically from past local residence on the part of those stockholders who would be full-time managers.<sup>8/</sup> In this limited and special sense, the Commission was correct. Greene had in fact never resided in the Rochester area; the community with which he was identified by participation in civic affairs and otherwise was Buffalo, 90 miles away, from which he had commuted to Rochester for his part-time employment (I.D., F. 74, 76). Past business activities in Rochester were relevant under the Policy Statement only "as a part of a participating owner's local residence background" (1 F. C. C. 2d at 396). Thus, the Commission, in referring to a lack of area familiarity, was in effect stating that both Community and Flower City were essentially on a par in this respect since neither of them could claim a preference over the other on the ground that the full-time participating stockholders were local residents.

The objection that the Decision does not show the basis on which Flower City was preferred over Star "whose proposed owner-manager had both broadcast experience and local residence" is likewise an empty one. The Commission's assessment that Flower City's stockholders' extensive broadcasting experience, particularly in television, is superior is a reasonable one. The Commission

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<sup>8/</sup> Obviously, Gordon Auchincloss of Flower City, who was married to a member of the Sibley family which had long-time roots in Rochester, and who had himself resided in that area in 1945, could not be said in either a literal or general sense to lack familiarity with the area. But concededly he was not a local resident at the time of the hearing and, therefore, so far as the integration factor was concerned, he also had to be denied credit for area familiarity in the context in which that term was used.

indicated its awareness of all the facts as to Star's experience and area familiarity by adopting the Examiner's detailed findings on these subjects and by noting in its conclusion Star's superiority to Flower City in local residency (Dec., par 8). The broadcast experience of Star's principal, Forman, upon which it now relies, was limited to radio. Moreover, although he proposed to devote a substantial amount of time each week to the proposed television station, the Commission found that he held important managerial positions in several other businesses. (See I. D., F. 47-49; Dec., par. 8.)

Appellants similarly argue elsewhere in their brief (pp. 78-79) that the Commission's Decision gave no indication that the broadcast experience of Community's proposed director of education and public affairs, Michael Hanna, was taken into account. Extensive findings concerning Hanna's experience (I. D., F. 78-80) were adopted by the Commission (Dec., par. 5). The Commission was not required to annotate these findings to its paragraph 8 evaluation in order to find, as it necessarily did by implication, that the television experience of Larson and of Auchincloss was more meaningful than Mr. Hanna's experience exclusively in radio.

Appellants further complain that there is uncertainty as to how the Commission evaluated integration in quantitative terms in view of the fact that Flower City proposed to integrate stockholders owning only 18.33% of its stock while Main proposed 50%, Star 37%, RTI 30%, Citizens 33% and Community 29%. Clearly, the choice of Flower City was not made, and need not have been made, on the basis of mere superiority in quantity of stock

ownership of participating stockholders. Moreover, it should be noted that the percentages stated by Appellants for Flower City include stock owned only by full-time participants whereas the percentages for Star, Main, Community and Citizens include stock owned by certain less-than-full-time stockholders. (See I.D., Concl. 19-29.) <sup>9/</sup>

Appellants allege that Flower City received a preference for time to be devoted to the station by stockholders with part-time duties without an explanation of why other applicants who also proposed part-time duties by stockholders did not receive similar credit. To the contrary, the Commission specifically recognized that Flower City was not to be distinguished from other applicants by reason of the fact that "a great majority of its stock is also held by persons who will devote some time to the operation of the station," by stating in the same sentence that this "is also true of most of the other applicants" (Dec., par 8). The Commission's recognition of such part-time ownership participation by other Flower City stockholders who had local residence was merely to explain why, in the particular circumstances of this case, the absence of prior local residence by Flower City's proposed full-time stockholder-managers who would necessarily move to Rochester was not deemed controlling.

Appellants further argue that the Commission should have found that Larson's contractual arrangement with Flower City (under which he acquired

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9/ It is also a fact of record that Auchincloss not only personally held 8.33% of the stock but is a member of the Sibley family group which owns 20.83% of the Flower City stock (I.D., F. 6), in addition to the 10% held by Larson, Flower City's other full-time stockholder-manager.

a stock interest but with a guarantee of reimbursement if the applicant lost) was not essentially different from Genesee's contractual arrangement with its proposed general manager (who would work without any stock interest). They urge that it was, therefore, error for the Commission to have treated them differently. The weakness of this contention is that Appellants are really challenging the use of participation in management by stockholders as a selection criterion, even though at page 56 of their brief they acknowledge "innumerable Commission decisions . . . emphasizing the importance of ownership participation in management as a comparative factor." If one does not own stock, he can hardly expect to gain a preference under the criterion. Larson would be no less legally responsible for the station's operation by reason of the fact that his stock was obtained with a reimbursement provision, especially since that provision would have been mooted by the final grant of the station license to Flower City. On the other hand, no matter how conscientious Genesee's proposed non-stockholder-manager might be, he would not have any degree of ultimate control over the basic policies of the licensee, and this is thought by the Commission to be less desirable. Such a reasonable policy determination is solely within the province of the Commission.

In short, all of the judgments of mixed fact and policy discussed above are solely for the Commission to make so long as those judgments are reasonably made and fairly discernible from the decisions and rulings, as they have been shown to be. See Pinellas Broadcasting Co. v. FCC, supra, and other cases cited above.

II. THE COMMISSION FULLY AND REASONABLY  
RESOLVED THE PROPOSED PROGRAMMING  
MATTERS

Appellants' argument (Br. 47-55) that the Commission erred in not undertaking a particularized comparison of the applicants concerning their ascertainment of programming needs and their plans for meeting those needs is untenable.

The Commission noted (Dec., par. 3) that the Policy Statement on Comparative Broadcast Hearings (1 F. C. C. 2d 393, 397-98) was applicable by its terms to this proceeding even though the hearing issues were designated prior to the issuance of the Statement. The Commission also explained in the Decision, as it had in the Policy Statement, why "ordinary differences in judgment will not be compared in the hearing process when each of the applicants, as here, had demonstrated that it is able to carry out its proposal."

The Commission has stated that while it recognizes the importance of programs as a vital element of the service to be rendered to the public, it has found from experience that ordinarily it is a waste of time in the hearing process to make comparisons of routine programming proposals and the manner in which they are formulated. <sup>10/</sup> Thus, since 1965, a decisional significance has been accorded only to material and substantial differences between applicants' proposed program plans, not to minor differences as here. As the Court has repeatedly stated, it will not substitute its judgment on such a matter for that of the

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10/ The Commission noted that "precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operations." 1 F. C. C. 2d at 397.

Commission. Pinellas Broadcasting Co. v. FCC, supra, and cases cited at pages 17-18, supra. See also FCC v. WOKO, Inc., 329 U. S. 223, 229 (1946). Nothing said in the cases cited by Appellants precludes this exercise of Commission discretion in determining the manner in which it will judge the significance of programming proposals.

It is clear from Pinellas and from other decisions of this Court discussed in part III of this brief, infra, that the Commission was free to apply a different standard for judging programming proposals than it had applied before the 1965 Policy Statement. Appellants were not prejudiced by the application of the new standard. In the Policy Statement, the Commission correctly stated (1 F. C. C.2d at 400):

"Since we are not adopting new criteria which would call for the introduction of new evidence, but rather restricting the scope somewhat of existing factors and explaining their importance more clearly, there will be no element of surprise which might affect the fairness of a hearing. It is, of course, traditional judicial practice to decide cases in accordance with principles in effect at the time of decision."

Appellants also argue erroneously (Br. 48) that the Commission "refused/ to take into consideration evidence that had been presented and contentions that had been made" under subissues 7(c) and (d) dealing with proposed programming. To the contrary, the Commission adopted the Hearing Examiner's extensive findings concerning this evidence about each applicant (I. D., F. 196-558) and determined (Dec., par. 3):

"From our consideration of the record in this proceeding, we are persuaded that each of the applicants has met its obligations in this respect being familiar with the area to be served and proposing an adequate programming

service to meet the ascertained needs and interests<sup>1</sup>/ and that variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs."

Accordingly, no applicant received a preference for preparation, staffing or proposed programming (Dec., par. 9).

As for Appellants' charges of inadequate preparation of program proposals by Flower City, the findings adopted by the Commission included a number which rejected such allegations as unwarranted by the record (see I. D., F. 209-24 & notes thereto). These findings show that meaningful community contacts were made and reflected in Flower City's program proposals before the parties' applications were designated for hearing. Neither the Examiner nor the Commission found fault with the manner in which the Flower City application was prepared, and they specifically rejected arguments to the contrary by Citizens (see I. D., F. 212 nn. 78 & 79, 217) and Genesee (see id. at 213, n. 81, 216 n. 82, 218 n. 84, 224). In her Conclusion 53, the Examiner stated that "a/11 applicants have made efforts to discover community needs and to plan programs with such needs in mind. In some instances contacts were made by principals and, in others, by employees or volunteers." To the extent that Appellants excepted to these findings and conclusions (see e. g., Citizens' Except. 63(b)), the Commission considered their contentions and denied them before adopting the above-mentioned findings (Dec., par. 5). Moreover, the Commission adopted detailed findings of fact concerning the program preparation of all of the Appellants (see I. D., F. 240-47, 262-65, 281-87, 300-09, 330-39,

352-55, 371-403, 416-44) and, as stated above, concluded that there were no significant differences warranting a preference of one or more of the applicants (Dec., par. 3 and 9). <sup>11/</sup>

As to proposed programming, the Commission adopted findings which, contrary to Appellants' contention here, included reference to the 24-hour daily (except Sunday) operation proposed by Star (see I. D., F. 249-61). It also denied Star's exception 11 to the Examiner's conclusion refusing to find that Star's proposed 24-hour operation merited a preference (I. D., Concl. 55).

Federal and Heritage did not even file exceptions on the points now attributed to them at page 49 of Appellants' brief. In any event, the Commission adopted findings showing that it had considered Heritage's proposals for "live" programming (I. D., F. 290) and Federal's proposals for commercial and network programming (I. D., F. 341), for which those parties here claim a preference. An examination of the comparable proposals of each of the other applicants (I. D., F. 198, 227, 250, 270, 316, 359, 406) shows that the Commission was eminently reasonable in finding no significant differences on these points (as it did by finding no significant differences on proposed programming generally).

Contrary to the thrust of another of Appellants' arguments (Br. 50), the evidence adduced under subsection (d) of the standard comparative issue was

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11/ Interestingly, in contrast to its position here, Appellant Main stated in its brief in support of exceptions, p. 10: "There is no basis for distinguishing among the applicants from the standpoint of preparation and planning. All have made contacts in the community; all have some degree of local ownership." And Appellant Federal, in its brief in support of exceptions, p. 10, applied a "point system formula" to the applicants and scored all of the present applicants identically on the factor of preparation.

considered, to the same extent as the evidence adduced under subsection (c), because under the new Policy Statement the inquiries of both subsections - directed to proposed programming and ascertainment of program needs - were subsumed under one heading. As stated above, the Commission addressed itself to both facets in finding no significant differences among the applicants. The Commission found that RAETA's withdrawal as an applicant had mooted "the evidentiary showings with respect to RAETA's specialized showing . . ." (Dec., par. 3 n. 3). It did not state, as Appellants suggest, that subissue (d) itself had been mooted. Indeed, as shown above, it is clear that the Commission reviewed and passed upon the evidence adduced under this subissue with respect to the remaining applicants.

III. THE COMMISSION FOLLOWED ITS POLICY STATEMENT IN ALL ESSENTIAL RESPECTS; ANY AD HOC MODIFICATIONS WERE INSIGNIFICANT AND WERE FULLY JUSTIFIED

Appellants accuse the Commission of unjustified departures from its 1965 Policy Statement on Comparative Broadcast Hearings, supra. Appellants confuse the generalized statement of policy or guidelines with its particularized application and ignore the well-established power - and duty - of a regulatory agency to deviate from previous generalized statements to the extent that the public interest requires by the facts of the particular proceeding. We submit that in essential respects - especially the emphasis placed upon diversification of control of the media of mass communications and upon full-time participation in station operation by owners - the Commission followed the thrust of the Policy Statement as to significant factors of comparison among those seeking broadcast licenses.

It is misleading for Appellants to state without more (Br. 56-58) that the Commission assigned more weight to broadcast experience than to local residence. The fact, rather, is that the Commission took into account, for a limited purpose, the long-term local residence of the many Flower City stockholders (holding 82% of its stock) who would devote less than fulltime to station operations (I. D., F. 4, 5, 7, 8, 12-33). As an additional reason for its willingness to minimize the non-local past residence of Flower City's full-time general manager and program director, the Commission observed, in accordance with note 7 of the Policy Statement, that these individuals would become local residents of Rochester. The Policy Statement explains: "Proposed future local residence (which is expected to accompany meaningful participation) will also be accorded less weight but, impliedly, some weight/ than present residence of several years' duration." (1 F. C. C. 2d at 396.)

Appellants appear to object (Br. 58-60) to the Commission attaching any significance to the local residence of stockholders who would devote less than full time to station operations. But the Policy Statement does not preclude this. Its only declaration about such participants is to the effect that "slight credit" will be given to their participation for purposes of an affirmative preference. It does not deal with the question of the relevance of their participation with respect to the evaluation, under the residence factor, of the full-time participants of the same applicant. The Commission directed itself only to the latter evaluation, as it indicated by observing simultaneously that other

applicants shared the local residence attributes of Flower City, and by concluding that "we do not believe that in this particular case the absence of past local residence by the two Flower City stockholders participating full time in the operation of the station is so significant" (Dec., par. 8).

Appellants' contention (Br. 61-68) that Flower City should have been downgraded because of inadequate programming preparation and planning and that the Commission violated the Policy Statement by failing to do this is essentially an elaboration upon one of the arguments made in part II of their brief. Contrary to this contention, it may be noted that the Commission expressly relied upon its Policy Statement in reaching the conclusion that there were no significant differences among the applicants on this point. (See Dec., par. 3 and 9, and part II of this brief, supra, where the substantive point is treated. It was that Policy Statement which declared that only significant differences in programming preparation and planning would be accorded decisional significance (1 F. C. C. 2d at 397-98).

Appellants would apparently have the Commission give the Policy Statement a formulistic interpretation in applying the ownership-management criterion in this case; the cases cited (Br. 69-70) involved administrative formulae and definitions. The essence of the Commission's duty, however, is to weigh a number of factors, the significance of which are determined by the facts adduced in the particular proceeding. In adopting the Policy Statement, the Commission recognized that:

"\* \* \* The hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable." (1 F. C. C. 2d at 393. )

All seven members of the Commission at the time of the Policy Statement gave notice in their several opinions that particular cases would require particularized treatment of the criteria. The majority's statement also recognized that there might be changes in Commission membership - as there has been - and in the views of the individual members (ibid.). Realistically, then, even departures from the Policy Statement would not constitute a change in policy. The Supreme Court followed this reasoning in upholding a Federal Trade Commission finding of deceptive advertising even though the FTC's "Guides Against Deceptive Pricing" appeared to permit the kind of advertising in question. In that case, FTC v. Mary Carter Paint Co., 382 U.S. 46, 47-48 (1965), the Supreme Court stated:

"These, of course, were guides, not fixed rules as such, and were designed to inform businessmen of the factors which guide Commission decision. Although Mary Carter seems to have attempted to tailor its offer to come within their terms, the Commission found that it failed; the offer complied in appearance only."

Similarly, in this proceeding, the Commission has followed guidelines, but evaluated, as it must, the substance and meaningfulness of the relevant attributes of each applicant to determine which would be most likely to operate in the public interest.

Even if we assumed arguendo that the Commission departed from its Policy Statement to such a degree as effectively to change policy, it was within its power to do so. The wide discretion exercised by the Commission has been expressed in the following oft-quoted language in Pinellas Broadcasting Co. v. FCC, supra, 97 U. S. App. D. C. at 238, 230 F. 2d at 206:

"The selection of an awardee from among several qualified applicants is basically a matter of judgment, often difficult and delicate, entrusted by the Congress to the administrative agency. The decisive factors in comparable selections may well vary; sometimes one applicant is superior to another in one respect, whereas in another case one applicant may be superior to its rivals in another feature. And it is also true that the Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes. \* \* \* All such matters are for the Congress and the executive and their agencies. They are political, in the high sense of that abused term. They are not for the judiciary.

"In the case at bar there appears some suggestion that the Commission has changed, or is changing, its view as to the dominant importance of local ownership and as to the evil of a concentration of the media of mass information. But in so doing it is operating within the area of legislative-executive judgment. The courts cannot interfere so long as the process, the premises, and the judgment are not arbitrary."

Earlier, in Churchill Tabernacle v. FCC, 81 U. S. App. D. C. 411, 413, 160 F. 2d 244, 246 (1947), the Court noted "the well-settled doctrine that res judicata and equitable estoppel do not ordinarily apply to decisions of administrative tribunals," and upheld a retroactive application of changed policy to a renewal applicant. "This follows from the statutory duty of the Commission to examine each application for renewal of license as an original proceeding and grant or

refuse it in the public interest" (ibid.). The Commission has explained how it reached its conclusions and need not explain why its conclusions may differ in certain respects from prior statements on the matter in question. FCC v. WOKO, Inc., 329 U.S. 223, 227-28 (1946), rev'g, 80 U.S. App. D. C. 333, 341, 153 F.2d 623, 631 (1946).

In sum, the facts of this case do not prove Appellants' claim that the Commission has departed in any substantial respect from the Policy Statement. But, in any event, the Commission has broad discretion in changing the guidelines concerning its application of comparative criteria. All of the Commission members anticipated at the time of its adoption that there could be no hard-and-fast application of the criteria set forth in the Statement.

#### IV. THE COMMISSION FULLY AND FAIRLY CONSIDERED ALL OTHER SIGNIFICANT DIFFERENCES AMONG THE APPLICANTS

The allegations of error contained in part IV of Appellants' brief are so insubstantial as to require only a brief comment upon each. The matters raised are, for the most part, disposed of upon recognition of the broad discretion of the Commission to expedite its proceedings - especially one so prolonged as this one - without the need to take notice of every post-hearing effort by a party to improve its position vis-a-vis the other applicants.

Appellants complain (Br. 71-73) that Federal's offer committing its sole stockholder to sell his existing stations in the Rochester area, if necessary, was not acted upon by the Commission. That offer was first made through counsel at the final oral argument, and it was not even put into the form of a proposed

amendment to its application until after Commission reconsideration of its decision and only ten days before Appellants' brief was filed in this Court (see Appellants' Br. 72 n. 1). The Commission was not obliged to explain its rejection of such an untimely and casual effort to remove what Federal must have known from the beginning was an obstacle to its winning the Channel 13 grant in view of the diversification of media criterion. Federal's contention was not of such a nature as to require a "plain answer." See Greensboro-High Point Airport Authority v. CAB, supra; Radio Station KFH Co. v. FCC, supra; and Scripps-Howard Radio, Inc. v. FCC, supra. Certainly no answer should have been expected to Federal's passing oral contention (see Appellants' Br. 73) that it should be credited as an opponent of the "newspaper monopoly" and "establishment" in Rochester, when it made no such argument in its exceptions and there was apparently no discussion of it in the Initial Decision. Similarly, the Commission was not required to comment upon a dissenting member's judgment that AM, FM and TV stations should be considered as one unit for purposes of the diversification of control criterion. Appellants do not even claim that any of them urged this conclusion upon the Commission.

Appellants' assertion (Br. 73-75) that the Commission ignored a Flower City shareholder's 5 per cent interest in a California radio station is equally without foundation. The Commission in fact made explicit reference to this acquisition and ruled that, in view of the great distance from Rochester and the small stock interest involved, it had no significant weight in this proceeding (Dec., par. 7 n. 8).

Also without merit is Appellants' contention (Br. 75-78) concerning RTI's amendment to specify full-time operation following the withdrawal of its share-timer RAETA. RTI gambled on the merits of its proposed joint venture with RAETA, and, when that ultimately failed, RTI sought a chance to rebuild its case. The Commission was acting within its discretion in limiting RTI's untimely efforts to shore up its weaknesses which were inherent in the original concept of that applicant as an operator sharing the channel with another organization. It is specious for the other Appellants to argue that they were in any way prejudiced by the Commission's allowance of RTI's full-time operation proposal without holding a further hearing. RTI's comparative qualifications even with the amendment were not of such a caliber as to enable it to win the vote of a single member of the Commission.

There is likewise no substance to Heritage's objection (Br. 79) that the Commission erred in imposing a demerit for the involvement of a principal, who is Heritage's president, director, chief executive officer and chief financial officer, in a false and misleading stock registration statement filed with the SEC by another company of which he was a founder and chairman of the board. The Commission adopted the Examiner's relevant findings on the matter (I. D., F. 93, 95). It noted that it was not engaging in a search for minor blemishes but properly concluded that the connection of the Heritage official with the misconduct in the SEC matter, for which he did not disclaim knowledge or responsibility, warranted a comparative demerit against Heritage.

Appellants point to no precedent for the argument (Br. 82-84) that the Commission had the authority and perhaps the duty to encourage a merger of the mutually exclusive applications for this television station. The Commission gave the parties ample opportunity to reach agreement on a merger. There were several efforts by certain of the parties, including Flower City, to effect a merger. But failing agreement of the applicants, the statutory scheme of the Communication Act required the Commission to choose the best single applicant from the applications filed with it. See Communications Act of 1934 §§ 307-09, 47 U.S.C. §§ 307-09; Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). Appellants urge that a statement on this point might be helpful to the Commission in deciding future multi-party comparative cases. Whether or not that is so, certainly its retroactive application to this case would be irrational. Even assuming that the Court agreed in general with Appellants, the very purpose of encouraging mergers to expedite Commission action - would be thwarted by any remand, since a final choice has already been made.

#### V. THE INITIAL DECISION WAS ADEQUATE UNDER THE ADMINISTRATIVE PROCEDURE ACT

The Initial Decision in this case comported with both the letter and the spirit of the Administrative Procedure Act, 5 U.S.C. § 557. <sup>12/</sup>

Channel 16 of Rhode Island, Inc. v. FCC, 97 U.S. App. D.C. 179, 229 F.2d 520 (1956), relied upon by Appellants, involved an initial decision setting forth

<sup>12/</sup> Appellants also rely upon Section 409(a) & (b) of the Communications Act of 1934, 47 U.S.C. § 409(a) & (b), which provisions duplicate the substance of certain requirements of 5 U.S.C. § 557.

findings of fact but no conclusions, thus affording no opportunity for exceptions to conclusions. In the case at bar, the Initial Decision included conclusions as well as findings and Channel 16 is inapposite.

Nor was Section 557 violated by the fact that the Examiner did not rank each applicant individually. There is no such requirement and Appellants have cited no authority to that effect. As the Commission's Broadcast Bureau, in its Opposition to petitions for reconsideration, stated (p. 7):

"I/n comparative cases it is not uncommon, and has never been uncommon, for Examiners not to rank the losing applicants. Nor do the petitioners recognize that, notwithstanding the absence of any ranking of losing applicants, the Commission and Review Board have in many instances preferred an applicant other than the one preferred by the Examiner. This practice has been pursued for many years, and the Court of Appeals has not held this practice to be contrary to statute."

Appellants equate the absence of seriatim ranking with "a failure to apply the comparative criteria to all of the applicants" (Br. 91). This is clearly erroneous. The Examiner applied the criteria to each of the applicants in order to state her conclusions in the manner in which she did. She summarized and characterized her findings on each applicant under each of several applicable criteria, and then made a comparison expressed in groupings of applicants. Section 557 was also satisfied by the opportunity to file exceptions to the Initial Decision findings and conclusions. And all the profuse exceptions were ruled upon in the final Decision. 13/

13/ Although Appellants make the argument (Br. 90 n. 1), they do not explain how RAETA's withdrawal "deprived" the Initial Decision of "an essential attribute" of potential finality. The fact is that by reason of the exceptions filed by Appellants and Intervenor alike - prior to RAETA's withdrawal - the Initial Decision no longer possessed that attribute. See FCC Rules and Regulations, § 1.276, 47 C. F. R. § 1.276.

The inquiry, then, is whether the objectives of an initial decision as provided in Section 557 were defeated by the procedural history of this case. A major premise of Appellants' argument to this effect is patently wrong. Contrary to their assertions, this Court did not hold in the Channel 16 case that "the most essential part of an initial decision" is its conclusions (Appellants' Br. 85). Nor does the legislative history of the Administrative Procedure Act so indicate. Both Senate and House committees on the Judiciary stated the major purposes of the initial decision are the "determination of credibility of witnesses as shown by their demeanor or conduct at the hearing," clearly emphasizing the importance of the findings of fact in the initial decision, and "to determine what other or additional facts they the parties/ might offer by way of rehearing or reconsideration of decisions." Administrative Procedure Act - Legislative History 1944-46, S. Doc. No. 248, 79th Cong. 2d Sess. 210, 211, 272, 273 (1946). In Kerner v. Celebrenze, 340 F.2d 736, 740 (2d Cir.), cert. denied, 382 U.S. 861 (1965), Judge Friendly stated:

"The chief reason . . . for making it mandatory that the man who heard the evidence should render some form of decision, was to provide the ultimate deciders with his evaluation of the credibility of witnesses. See Universal Camera Corp. v. NLRB, supra, 340 U.S. at 496, 71 S.Ct. at 468-479 and the legislative history cited in nn. 29-31. As Mr. Justice Frankfurter there stated, 'the significance of his the hearing examiner's/ report of course, depends largely on the importance of credibility in the particular case.'"

Certainly, credibility of witnesses in the instant case is not significant or such as to require new conclusions by a hearing examiner upon the withdrawal of RAETA. Appellants do not assert that the findings in the Initial Decision, as adopted by the Commission, are otherwise than fully supported by the record.

Appellants were not prejudiced by the absence of a new initial decision (see 5 U.S.C. § 706). They had ample notice of the facts as found and used by the Examiner in reaching her conclusions. They filed lengthy exceptions contesting findings of fact and conclusions by the Examiner. Each Appellant argued, both in writing and in two oral arguments, that it should be preferred over all other applicants, recognizing that the contest was between it and every other applicant, notwithstanding the Examiner's preference of RAETA-RTI. Thus its arguments with respect to the non-share-time applicants would not have changed materially even if each had been assigned a specific rank by the Examiner. Nor would its arguments with respect to those applicants have changed materially if it had known that the share-time application of RAETA would be withdrawn. <sup>14/</sup> In view of the multiple opportunities to present their contentions to the Commission, including urging reconsideration of the Commission's rulings and decision, the claim of procedural deficiency is plainly insubstantial. The Court aptly stated in Sisto v. CAB, 86 U.S.App.D.C. 31, 35, 179 F.2d 47, 51 (1949):

"When there is an appeal to the Board, the findings, conclusions, and orders of the examiner are only tentative or interlocutory in nature. And in such cases it is the orders of the Board which are final and appealable. Thus as long as the requirements of a full hearing are satisfied at some time prior to the issuance of a final order, there can be no complaint on that ground."

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<sup>14/</sup> While, presumably, the contentions of RTI would have been different if it had foreseen the loss of its share-time partner RAETA, it voluntarily assumed the risk of such a loss when it made the strategic choice to abbreviate its own proposed operations and to lean upon RAETA and that applicant's uniqueness as an educational organization. It could not demand in midstream of the proceeding that it be permitted to file what in effect would be a new application.

In any event, any error on the part of the Examiner in not ranking each applicant in order of her preference was waived. While two applicants took exception to certain specific conclusions for this reason (see Appellants' Br. 86), not a single one took the position that the Initial Decision was invalid for this reason or that a supplementary initial decision was required. The objection concerning the fatal nature of the absence of individualized ranking was waived. FCC Rules and Regulations § 1.277(a), 47 C.F.R. § 1.277(a); cf. Abacoa Radio Corp. v. FCC, 123 U.S. App. D.C. 218, 358 F.2d 849 (1966). Nor, upon RAETA's later withdrawal and the cancellation of remand proceedings, did any applicant argue or suggest that further hearing and initial decision were necessary. None of the applicants other than RTI moved to supplement the record so as to reflect factual consequences of RAETA's withdrawal.

As detailed in the Counterstatement of the Case, supra, all of the parties except two filed pleadings in early 1967 urging a prompt decision by the Commission. At a second oral argument ordered sua sponte by the Commission in May 1967, Heritage and Main, both of which had joined in the earlier pleadings, raised for the first time an objection to the legality of the Initial Decision. All Appellants (except Star, which thought further hearing would be necessary only if RTI was permitted to amend its program proposals) opposed any further hearings or other delay in the Commission decision. Instead, they affirmatively invited the Commission to act expeditiously in issuing a decision, as if the Initial Decision presented no obstacle to a valid Commission decision. In short, none of the Appellants timely

objected to the validity of the Initial Decision either before or after RAETA's withdrawal. <sup>15/</sup> Appellants' unsupported argument that an error in following 5 U. S. C. § 557 cannot be waived because it is "jurisdictional" (Appellants' Br. 88) is plainly wrong, according to legislative history directly in point. Administrative Procedure Act - Legislative History 1944-46, supra, at 209. See United States v. L. A. Tucker Truck Lines, 344 U. S. 33, 38 (1952). <sup>16/</sup> At the very least, Appellants' long-time acquiescence to the validity of the Initial Decision show that they recognized that any technical deficiency of the Initial Decision or in proceedings thereafter was not prejudicial to them (see 5 U. S. C. § 706), and that the alleged error was "brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits. . . ." <sup>17/</sup> Appellants have not borne their burden of showing prejudice or that a remand "would accomplish anything save further expense and delay." Kerner v. Celebrezze, supra, 340 F. 2d at 740.

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<sup>15/</sup> Cf. United States v. L. A. Tucker Trunk Lines, Inc., 344 U. S. 33, 35-38 (1952); Watson Bros. Transportation Co. v. United States, 180 F. Supp. 732, 739 (D. Neb. 1960); Magnet Cove Barium Corp. v. United States, 175 F. Supp. 473, 475-76 (S. D. Tex), aff'd, 361 U. S. 32 (1959).

<sup>16/</sup> Although an objection raised below by one party may preserve an error for appeal by another party, an appellant will not ordinarily be permitted to complain of an error which he himself invited. Orenstein v. United States, 191 F. 2d 184, 193 (1st Cir. 1951). This goes to the point that even assuming arguendo that Main and Heritage preserved an error for themselves by objecting to the Initial Decision at the May 1967 oral argument, the other Appellants could not benefit from this fact, because they urged the Commission to go forward. And it is clear from the final Decision that, upon any remand, Main and Heritage would have no chance of ousting Flower City as the Commission's choice.

<sup>17/</sup> United States v. L. A. Tucker Truck Lines, Inc., supra, 344 U. S. at 35-36; Magnet Cove Barium Corp. v. United States, supra, 175 F. Supp. at 476. Cf. Colorado Radio Corp. v. FCC, 73 U. S. App. D. C. 225, 227, 118 F. 2d 24, 26 (1941).

CONCLUSION

For all the foregoing reasons, the decision of the Commission should be affirmed.

Respectfully submitted,

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Attorneys for Intervenor

April 17, 1968



IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**PETITION FOR REHEARING OF  
STAR TELEVISION, INC.**

**United States Court of Appeals  
for the District of Columbia Circuit**

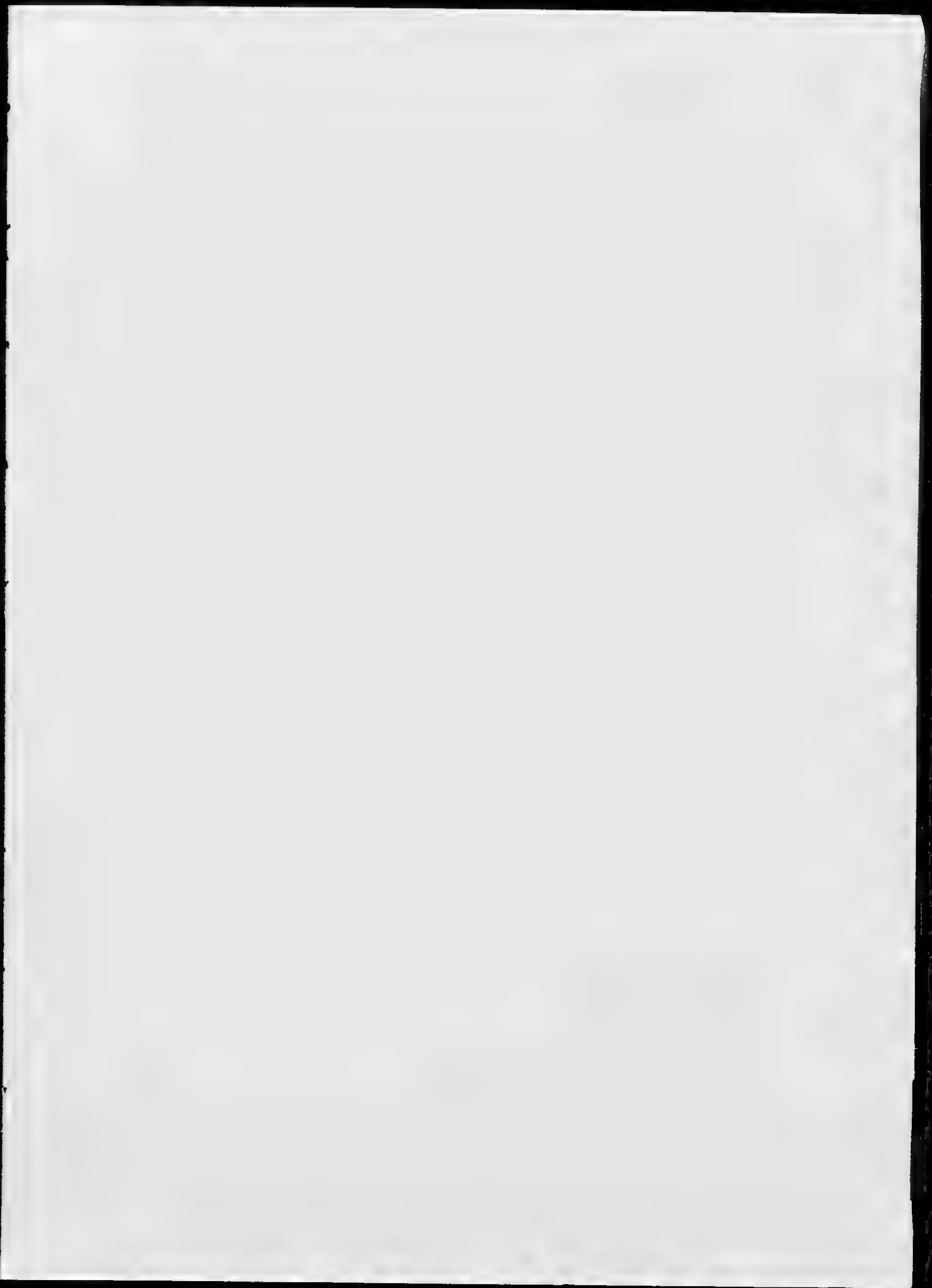
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United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STAR TELEVISION, INC. (No. 21,277); )  
COMMUNITY BROADCASTING, INC. (No. 21,541); )  
CITIZENS TELEVISION CORP. (No. 21,542); )  
THE FEDERAL BROADCASTING SYSTEM, INC. )  
(No. 21,543); HERITAGE RADIO AND TELE- )  
VISION BROADCASTING CO., INC. (No. 21,544); )  
GENESEE VALLEY TELEVISION CO., INC. )  
(No. 21,545); MAIN BROADCAST CO., INC. )  
(No. 21,546); ROCHESTER TELECASTERS, INC. )  
(No. 21,547) )  
  Appellants, )  
  )  
  )  
  v. )  
  )  
  )  
FEDERAL COMMUNICATIONS COMMISSION, )  
  Appellee, )  
  )  
  )  
FLOWER CITY TELEVISION CORPORATION, )  
  Intervenor, )  
  )

**PETITION FOR REHEARING OF  
STAR TELEVISION, INC.**

STAR TELEVISION, INC. (hereinafter "Star"), Appellant in Case No. 21,277, by its attorneys and pursuant to Rule 40 of the Federal Rules of Appellate Procedure (F.R.A.P.), hereby respectfully requests that the Court's decision in the above-captioned case, rendered on January 30, 1969, be reheard by the same panel of this Court.<sup>1</sup> That decision af-

<sup>1</sup>The panel was composed of Senior Circuit Judge Prettyman, Judge Burger, and Judge Leventhal. Judge Prettyman wrote the majority opinion for himself and Judge Burger, while Judge Leventhal filed a dissenting opinion (Case Nos. 21,277 and 21-541-47, decided January 30, 1969).

firmed actions of the Federal Communications Commission (hereinafter "Commission") awarding a construction permit to Intervenor for a new television broadcast station on Channel 13 at Rochester, New York, and denying the applications of Star and other parties for Channel 13. *See Flower City Television Corp., et. al.*, 9 FCC 2d 939, 10 FCC 2d 718 (1967). The principal grounds for this petition are that the Court has either overlooked or misapprehended a substantial point of law raised by Star; namely, that the Commission below denied Star procedural due process by failing to consider and to make findings of fact on extensive record evidence adduced by Star under a key comparative issue (*viz.* the "unfulfilled programming needs" issue) added herein by the Commission itself. As a result, Star believes and will show that it was denied its right to a full and fair hearing before the Agency. In support of this request for rehearing, it is respectfully stated as follows:

#### I. PRELIMINARY STATEMENT

1. As the Court has aptly noted, this case was "enormously complicated and tedious" (Slip Op., p. 4). A total of sixteen substantive and procedural points were raised on appeal by the eight appellants in their consolidated brief. Because the Court directed the filing of a single joint brief with a specific page limitation, it was inevitable that a particular argument which an individual appellant might have wanted briefed separately could not be so treated. Instead, to accommodate the interests of all appellants, certain arguments, perforce, had to be grouped together or coalesced into other arguments dealing generally with the same subject matter. This is particularly the case with Star's point which was required to be merged with other points on pages 47-55 of Appellants' Brief. Due to these facts, Star believes that its primary contention on appeal -- that the Commission's arbitrary refusal to resolve the designated "unfulfilled programming needs" issue herein by failing to consider or to make findings

upon Star's detailed evidentiary showing introduced thereunder constituted pre-judicial procedural error<sup>2</sup> -- may not have been fully comprehended by the Court.

2. Indeed, it would appear that the Court has either "overlooked or misapprehended" Star's procedural point. See Rule 40, F.R.A.P. This is particularly so since although the Court acknowledged that the "noteworthy phase" of appellants' dispute with the Commission "concerns principally the procedural requirements in a decision in a comparative case", no discussion, much less any mention of Star's procedural point was contained in the Court's Opinion (p. 4). It is therefore for this reason that Star now respectfully requests a re-hearing on its procedural point. In this connection, Star believes that the following factual statement, limited solely to this point, will be of assistance to the Court in its resolution of Star's request.

## II. STATEMENT OF THE CASE

3. In January, 1962, the above-captioned applications were designated by the Commission for consolidated hearing on the so-called standard comparative issue. As originally designated, *inter alia*, that issue contained subsection (c), which called for a comparison among the applicants in light of:

"(c) The programming service proposed in each of the the above-captioned applications."

Thereafter, at the request of the Rochester Area Educational Television Association, Inc. (RAETA), the Commission enlarged the issues and added another separate and completely different issue calling for a comparison of the

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<sup>2</sup>Star has argued this critical point both below and before the Court. See, e.g., Star's *Motion For Stay Pendente Lite* filed herein on January 17, 1968; Appellants' Brief, pp. 47-55, filed herein on March 18, 1968.

applicants with respect to:

"(d) The programming service proposed in each of the applications considered in the light of the following factors:

- (1) Whether there are particular types or classes of programs for which there is an unfulfilled need in the area proposed to be served;
- (2) The extent to which the program proposal of each applicant would meet such needs."

This "unfulfilled needs" issue (subsection (d)) was generally phrased and contained absolutely no limitations either as to its applicability to a particular applicant, or to the type of program needs which an applicant could demonstrate thereunder. Each applicant was thus free to make any kind of evidentiary showing on this issue which it deemed appropriate.

4. Prior to formulating its proposal, Star conducted a comprehensive survey of the programming needs not only of Rochester and Monroe County, New York (wherein Rochester is located), but also of the surrounding 8-county area which would be served by its station.<sup>3</sup> Together, this 9-county area constitutes the "Rochester Economic Region". Based on its program surveys, Star found that there were indeed certain "unfulfilled needs" in the Rochester area which were not being met by existing stations and which could and should be met. Hence, Star's entire programming proposal was geared to meet such needs.

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<sup>3</sup>Star gathered a great deal of data and information about the area's diverse programming interests, by breaking down community and area activities into 18 separate categories (Industry, Labor, Cultural Resources, Commerce, etc.). Over 90 diverse public and semi-public surveys and publications relating to these various categories were studied and analyzed by Star to learn the significant problems involved in each category. In addition, Star conducted detailed interviews with 75 community leaders throughout the area concerning their organizations' programming needs and resources.

5. In this regard and pursuant to the Commission's designation of the "unfulfilled needs" issue (subsection (d)), Star introduced substantial evidence at the hearing demonstrating that there was an unfulfilled need in the 9-county Rochester Economic Region for (a) a full-time, 24-hour TV station which would provide (b) an *independent* local and regional news and information service, and a shower of varied and stimulating opinions throughout the day (via editorials, interviews, forums, documentaries, etc.) for (c) *both* the rural and urban areas of Rochester.<sup>4</sup> Similarly, Star established, *inter alia*, that of the five mass media serving the identical area proposed to be served by the Channel 13 applicants, three of them (2 Rochester newspapers and 1 Rochester TV station, WHEC-TV, Channel 10) were owned and operated by a single interest, the Gannett Co., Inc.; that the two Gannett newspapers totally dominate daily newspaper circulation in the Rochester area; that there is a paucity of full-time broadcast media in the 8-county area outside of Rochester; that the two existing TV stations in Rochester provide inadequate news coverage of the area; that neither of the two non-Gannett area mass media (1 radio and 1 TV station) editorialize; that there is a virtual void of discussion or other programming devoted to issues of a controversial nature by the existing Rochester TV stations; and that such stations do not provide *any* programming after 1:00 A.M. and have, for the most part, ignored the needs of the 8-county area outside Rochester (See Volumes III and XI of Joint Appendix filed herein for relevant record references and citations, (see also pages 52-59 of Star's Proposed Findings).

6. Intervenor, the winning applicant below, was comprised of a number of Rochester business and professional men, completely without any prior broadcast experience, who had hired a general manager and program director

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<sup>4</sup>RAETA submitted evidence purportedly demonstrating an unfulfilled need for educational programming, although that exhibit also showed a need for more public affairs and discussion programming of the type proposed by Star.

and permitted them to subscribe to 10% and 8.33%, respectively, of the corporate stock. These two individuals were not, nor had they ever been Rochester residents. Neither had they had any prior familiarity with the Rochester area. Moreover, Intervenor's survey of the area's program needs consisted of only a limited effort *after* its programming proposal had been determined. It was confined to just metropolitan Rochester, and did not include outlying rural areas.<sup>5</sup> In fact, Intervenor's program proposal was thrown together in a few hours in the office of Intervenor's attorney in Washington, D.C. by its proposed General Manager and Program Director, immediately before its application was filed.

7. In stark contrast, Star was composed of present or former owners and employees of AM and FM broadcast stations in Rochester,<sup>6</sup> plus local business and professional men. Star's President and 32% stockholder, who is also an experienced broadcaster in Rochester, planned to devote his full time to the daily affairs of the proposed TV station. Further, Star's proposed News Director, Chief Engineer, Sales Manager and News Reporter, all of whom are minority stockholders and long-time employees in comparable capacities of Star's President's former broadcast stations in Rochester, also planned to devote full time to the daily operation of the station. Other local residents and minority stockholders would devote varying amounts of time to the proposed station's affairs.

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<sup>5</sup>Under well established precedent, broadcast applicants and licensees are required to make a "diligent, positive and continuing effort... to fulfill the tastes, needs and desires of [their] community or service areas..." which "will not be served by pre-planned program format submissions..." but rather by "documented program submissions prepared as the result of assiduous planning and consultation..." with community leaders and the listening or viewing public in the area to be served. *Commission Policy on Programming*, 20 Pike and Fischer, RR 1901, 1915 (1960); *Patrick Henry v. FCC*, 112 U.S. App. D.C. 257, 302 F. 2d 191 (1962). (1962).

<sup>6</sup>The present stockholders of Star do not now own any Rochester broadcast stations.

8. Compared to Intervenor, Star would provide a far better and more efficient service to meet the Rochester area's unfulfilled program needs. This is especially so since Intervenor's program proposal virtually ignored the needs of the 8 outlying rural counties surrounding Rochester. See paragraph 6, *supra*. Nothing more than a routine, pedestrian program service was proposed by Intervenor, with short newscasts at the same times such were presented by the two other network affiliates in Rochester. Additionally, Intervenor's programming was designed to stifle, rather than to stimulate, public opinion on timely controversial issues. Some measure of the comparative attention which Star and Intervenor would give to the demonstrated need in the Rochester area for additional local news and opinion programming is vividly shown by the fact that Star would devote *three times* as much time to local news broadcasts (many of them directed specifically to information about the 8-county area outside of Rochester), and almost *four times* as much time to discussion of controversial matters, as would Intervenor.<sup>7</sup> In short, Star conclusively showed that it would far better meet the unsatisfied program needs of the Rochester area as developed under the "unfulfilled needs" issue, than would Intervenor or any other applicant.

9. An Initial Decision was issued by the Examiner in January, 1964, proposing to grant the joint share-time application of RAETA and Rochester Telecasters, Inc. (RTI), principally because of the 100% educational program proposal of RAETA. In the Examiner's view, such programming would best meet the "unfulfilled needs" of the Rochester area.<sup>8</sup> Thereafter, Star consistently urged the Commission that the Examiner was wrong in this respect and that a

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<sup>7</sup>For example, Star would originate 17 hours a week of local newscasts, 9-1/3 hours of discussion programming, and operate 161 hours per week. By contrast, Intervenor proposed only 5-1/2 hours of weekly local news programs, a scant 2-2/3 hours of discussion programs, and a 116-1/3 hour weekly operation.

<sup>8</sup>RAETA's application was subsequently dismissed, at its request, in return for payment of its expenses.

far greater and more acute "unfulfilled need" existed for the news, informational and opinion programming which Star proposed on a 24-hour basis for the entire 9-county Rochester Economic Region (See Volumes III and VIII of Joint Appendix).

10. After oral argument, on August 3, 1967, the Commission, by a vote of 3 to 2, granted Intervenor's application and denied the other mutually-exclusive applications. Most importantly, with respect to the designated subsection (d) issue requiring a comparison of the applicants' various proposals to provide particular programming for which there is an "unfulfilled need in the area to be served," the Commission merely held that since RAETA's application had been dismissed, evidentiary showings with respect to this issue had been rendered "moot", 9 FCC 2d at 251. Moreover, in ruling upon Star's Exceptions (Nos. 83, 91-130) and conclusions (Nos. 2-5, 12) relating to this issue, the Commission simply said:

"These matters are moot in light [view]of the dismissal  
of RAETA's application." 9 FCC 2d at 258.

No further explanation was given by the Commission as to why it completely disregarded Star's critical evidentiary showing in this area.

### III. THE COMMISSION'S FAILURE TO CONSIDER AND TO RULE UPON THE SUBSTANTIAL EVIDENCE INTRODUCED BY STAR UNDER THE "UNFULFILLED NEEDS" ISSUE VIOLATED DUE PROCESS

11. Under Section 8 of the Administrative Procedure Act, 5 U.S.C. Sec. 557, the Commission is required to resolve "all the material issues of fact, law, or discretion presented on the record." Basic due process requires, at the very least, that an administrative agency consider *all* the record evidence material to resolution of an important issue in a case which it undertakes to decide. As

this Court said in *Michigan Consolidated Gas Co. v. Federal Power Commission*, 108 U.S. App. D.C. 409, 431, 283 F. 2d 205, 226 (1960), "[W]here a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration". Certainly, in comparative proceedings such as the instant one, it is axiomatic that the Commission is required, as a matter of fundamental fairness and administrative due process, to consider *all* material differences between the applicants and to resolve their claims for comparative preferences in accordance with the designated issues. *Johnston Broadcasting Co. v. Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949).

12. As will be shown below, however, these requirements were flagrantly violated by the Commission's refusal or unwillingness to resolve the "unfulfilled needs" issue (subsection (d)). By arbitrarily disregarding Star's detailed evidentiary showing that there are unfulfilled needs in the Rochester area for particular types of programming which Star proposed to provide (see pars. 4-5, *supra*) the Commission plainly deprived Star of the "rudimentary requirements of fair play", *Morgan v. United States*, 304 U.S. 1, 15 (1938), and "the pertinent demands of due process," *Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, (1933). Indeed, failure to consider such evidence and to make findings thereon is tantamount to a denial of a full and fair hearing, warranting this Court to vitiate the Commission's decision below.

13. As explained in paragraph 3 above, in addition to subsection (c) of the standard comparative issue calling for a comparison of the applicants' proposed program service, the Commission added another separate and distinct issue in this proceeding. That issue, relating to "unfulfilled needs" (subsection (d)), did not simply require a comparison of programming proposals, as did the subsection (c) issue. Rather, the "unfulfilled needs" issue called for an identification of specific program needs which were not being met and the means by which each applicant proposed to meet such needs.

14. As pointed out above, Star excepted to the Examiner's findings and conclusions that there was a greater unfulfilled need for educational programming, i.e., "in-school" viewing programs, than for the type of programming proposed by Star. In footnote 3 of its Decision (9 FCC 2d at 251), the Commission stated simply that the "unfulfilled needs" issue had been added at RAETA's request, and that because of RAETA's withdrawal from the case, "the evidentiary showings submitted with respect to RAETA's specialized proposal are now moot". However, in ruling on Star's Exceptions to the Examiner's factual findings (Nos. 83 and 91-130) and to her conclusions (Nos. 2-5 and 12) bearing directly on this issue, the Commission went further and "denied" Star's exceptions on the ground that "[T]hese matters are moot in view of the dismissal of RAETA's application" (9 FCC 2d at 258).

15. It is thus clear that the Commission's ruling of mootness extended not only to RAETA's showing under the "unfulfilled needs" issue, *but also to the issue itself and the contentions made thereunder by Star.* In short, the Commission completely ignored the fact that the "unfulfilled needs" issue was expressly designed to evaluate the comparative merits of the competing applicants' program proposals. The Commission apparently was laboring under the misapprehension that the "unfulfilled needs" issue was strictly for RAETA's benefit alone, and automatically ceased to have any legal force or effect when RAETA withdrew from the case. This was plainly wrong.

16. Of especial significance, in adding the "unfulfilled needs" issue, the Commission expressly relied on *Rollins Broadcasting Co.*, 20 Pike and Fischer RR 976, 978 (1960), wherein an identical issue was included in a comparative proceeding. According to the Commission's designation order herein, the "same considerations" which warranted the inclusion of that issue in *Rollins* were "equally applicable" here. See *Memorandum Opinion and Order* released April 13, 1962 (FCC 62-385); *Integrated Communications Systems, Inc.*, 3 Pike and Fischer, RR 2d 557 (1964). Yet, in the *Rollins* case, the Commission held

that under the "unfulfilled needs" issue, an applicant in a comparative proceeding should be afforded an opportunity to show that its proposed service area has a need for a specific type of programming; that such need is not being met by the programming fare of existing stations; and that the applicant will serve such needs better than any of the competing applicants. Lest there be any doubt, the Commission said:

*"...[W]e reemphasize that the subject issue is merely one of the comparative criteria to be judged herein, the ultimate weight of which can only be determined at the conclusion of the hearing."* (Emphasis supplied) 20 RR 798(c).

17. Thus, although the Commission has held that an applicant's showing *must* be comparatively evaluated under the "unfulfilled needs" issue, it has altogether refused to follow that ruling here without offering any explanation whatsoever. In this connection, it is no answer to Star's contentions for the Commission's counsel to argue, as he did on pages 29-30 of Appellee's brief, that the Commission was fully aware of Star's "unfulfilled needs" showing but rejected it by holding that the "variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs." This argument is both disengenuous and factually incorrect.

18. Any reading of the Commission's decision shows clearly that the holding upon which Commission counsel totally relied dealt *solely* with normal comparative programming considerations referred to in the Commission's *Policy Statement on Comparative Broadcast hearings*, 1 FCC 2d 396 (1965), and covered by subsection (c), and *not* subsection (d), of the standard comparative issue. The Commission's holding simply had no bearing on or relevance to the "unfulfilled needs" issue, as Commission counsel has erroneously claimed. Surely, if the Commission resolved the "unfulfilled needs" issue, it should be possible to find somewhere in the Commission's decision a finding of the un-

fulfilled needs which exist in the Rochester area, or a finding that there are no such needs. However, such a finding is not to be found. Assuming *arguendo* that the Commission did actually rule on Star's evidentiary showing relating to unfulfilled needs, as Commission counsel has asserted, such consideration was purely arbitrary. For, by no stretch of the imagination can the substantial differences between the amounts of time which Star and Intervenor planned to devote to news, public affairs and discussion programs, etc. be deemed "minor differences". (See Fn. 7, *supra*).

19. In sum, the Commission has flatly refused to consider Star's exhaustive evidentiary showing that there are three principal unmet needs in the Rochester area which its proposal was especially designed to satisfy:

(a) a need for a daily, 24-hour rural and urban TV service fashioned to the special needs of the entire 9-county Rochester Economic Region, to fill the existing void of early morning (1-6 AM) TV service therein;

(b) a need for a comprehensive and professionally presented news and information service stressing local and regional developments, provided by a TV station which would be divorced from other area media of mass communications; and

(c) a need for daily commentary, discussion, editorial, and opinion programming which would stimulate and enlighten residents of the Rochester area on controversial issues of public importance.

In so doing, the Commission has failed to comply with elemental procedural due process.

20. The unfulfilled public needs for particular "types or classes of programs", to use the language of subsection (d), did not disappear with the dismissal of RAETA's application, as the Commission's holding of mootness presumes. In fact, RAETA's own evidence under subsection (d) showed a need for *more* public affairs and discussion programs of the kind proposed by Star

than it did for educational programs. The Commission had a distinct obligation to consider and to make specific findings upon Star's evidentiary showing of its proposed programming designed to meet the area's unfulfilled needs. See *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947); *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173 (1959). But, it did not do so. The Commission's failure in this regard therefore constituted the essence of arbitrariness requiring reversal by this Court. See *Morgan v. United States*, 298 U.S. 468 (1936).

#### IV. CONCLUSIONS

WHEREFORE, in light of all the foregoing, Star respectfully requests that the above-captioned proceeding be reheard by the same panel of this Court and that the grant to Intervenor be set aside and vacated. In addition, it is respectfully requested that this proceeding be remanded to the Commission for further proceedings, and that the Court grant such other relief as is just and proper.

Respectfully submitted

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